



Think Tank Report 2008

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I. INTRODUCTION

Residence as a legal concept has many dimensions and definitions. The content of the concept and its functions vary depending on the national legal order which creates the legal environment for the interpretation of the concept, as well as on the applicable instrument of Community law.

Indeed, the residence concepts used in national legislation and in European Community law may have different contents. For example, the concept of residence used in national law for defining tax liability might differ significantly to that serving as a condition for awarding social benefits. The latter concept, in turn, is likely to refer to a different notion than residence used in national immigration legislation. Likewise, the notions of residence used in secondary legislation enacted to give effect to the freedom of movement of persons cover different matters.

Under the comprehensive coordinating mechanism created by Regulations 1408/71 and 883/2004, the main principle of applicable legislation connects the person with the Member State where he/she is economically active and aims to ensure that this Member State provides all benefits irrespective of the place of residence of the beneficiary or his/her family members (*lex loci laboris* –principle). As will be seen *infra*, the place of residence of the person is decisive for the determination of applicable legislation only in some exceptional cases, at least insofar as economically active persons are concerned.

In national social security legislations, residence can be used either as a condition for coverage under a certain social security scheme or as a condition for entitlement. In the first case, residence can be either a condition for the commencement of coverage (affiliation) or for the continuity of that coverage. Residence as a condition of entitlement to benefits (including award/payment of benefits) can be imposed either for acquiring the right to benefit or for retaining that right. When residence is a condition for commencement of coverage or for acquiring entitlement, either present residence or former periods of residence can be taken into account. We can find examples of all these dimensions in the national legislation and administrative practice of the Member States. Some concrete examples are presented in the table annexed to this report.

In some cases, national social security rules expressly provide that entitlement to benefits is subject to the condition that the person lawfully resides in the territory of the State concerned. It should be noted that the social security coordination rules, i.e. Regulation 1408/71 and Regulation 883/2004 do not contain this criterion¹.

¹ However, such criterion does exist in Regulation 859/2003. Indeed, Article 1 of this Regulation extends the provisions of Regulation 1408/71 to third-country nationals who are not already covered by these provisions solely on the grounds of their nationality, provided they are in a cross-border situation and “are legally resident in the territory of a Member State”. A similar provision is contained in the proposal for a regulation extending the provisions of Regulation 883/2004 to third-country

Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States lays down minimum conditions under which Union citizens have a right to reside in the territory of the Member States. Even though the Directive is primarily concerned with laying down the conditions governing the exercise of the right to reside, it also touches upon the issue of social benefits, and it does so from two different, yet interrelated, perspectives: entitlement to social benefits may play a role in assessing the (continued) fulfilment of the substantive conditions of the right of residence. Moreover, persons legally residing on the basis of the Directive in principle enjoy equal treatment as regards social benefits.

This report focuses on the relationship between these two instruments of Community law, i.e. Regulations 1408/71 and 883/2004 on the one hand, and the Directive 2004/38/EC on Union citizens' right to move and reside on the other. The Community legislator has not given any guidance as to the hierarchy or priority between these two instruments, nor has it provided principles for solving possible conflicts. This report seeks answers to the following core questions which can be formulated as follows:

- 1) Does the right to residence and equal treatment provided by Directive 2004/38/EC challenge the established rules and principles of the Regulation 1408/71 and Regulation 883/2004?
- 2) What is the impact of having, or claiming, rights on the basis of the coordination Regulations on the acquisition and retention of the right of residence within the meaning of Directive 2004/38/EC?

In order to answer these questions, we need to examine how residence is regulated by Regulations 1408/71 and 883/2004. For that, it is crucial to understand how and for what purposes the concept of residence is used in national social security schemes – which the Regulations aim to coordinate, and not to harmonise.

As Community law is implemented and interpreted within the framework of fundamental freedoms and fundamental principles of Community law, it is also important to reflect on the constitutional dimension of the evolution of European law in the field of Union citizenship in order to understand the impact of the statements of the ECJ and the EU legislature on citizens of the Union and within the context of future European social constitutional principles.

II. SOCIAL SECURITY COORDINATION AND RESIDENCE

II.1 The rules on applicable legislation

II.1.a. The *lex loci laboris* principle

The starting point of the rules on the determination of the applicable national social security legislation in Regulation 1408/71 is the “*lex loci laboris* principle”: an economically active person is subject to the legislation of the Member State in which territory s/he is employed even if s/he resides in the territory of another state (Article 13(2) a) and b)).

nationals not already covered by these provisions solely on the ground of their nationality, COM(2007) 439 of 23 July 2007.

The choice of the *lex loci laboris* principle, which, insofar as the European Union is concerned, dates back to 1958, has been commented on numerous times. Over and above the fact that this choice was self-evident as seen from a historical perspective – all of the six founding members operated work-based schemes – the application of the legislation of the country of employment was considered best suited to promote the free movement of workers and, in particular, equal treatment laid down in Articles 39 and 43 EC (cf. *Pinna I*, § 24). The strong link between the *lex loci laboris* principle and the freedom of movement of persons has recently been confirmed by the ECJ².

The *lex loci laboris* principle has been criticised, mainly as a result of the accession of Member States operating residence-based schemes and developments in national and EU legislation (e.g. the introduction of Union citizenship)³. Notwithstanding this, the *lex loci laboris* principle determines the applicable legislation for employed and self-employed persons under the new social security coordination Regulation 883/2004.

II.1.b. The *lex loci domicilii* principle

In several cases, the coordination Regulations depart from the *lex loci laboris* principle in favour of a connection with the State of residence of a person, in accordance with the *lex loci domicilii* principle.

1) This is the case, firstly, as regards economically active persons, in cases where the application of the *lex loci laboris* principle is not operative – as there are several States of employment at the same time – or would yield results – notably frequent changes of legislation applicable – deemed undesirable. Those who are subject to the legislation of the State of residence, under certain conditions, include persons who are simultaneously active in the territory of more than one Member State (see Article 14 (2) and Article 14a (2) of Regulation 1408/71), mariners (Article 14(4)), and very often in practice posted employed or self-employed when they maintain their residence in the State in which they are normally active (Article 14 and 14a). The application of the legislation of the State of residence for economically active persons in such situations has been confirmed by Regulation 883/2004 (see Articles 12 and 13).

2) Furthermore, it follows from the rules of Title II of Regulation 1408/71 that *economically non-active persons* are subject to the social security legislation of the Member State of residence⁴. According to Article 13(2)(f) of Regulation 1408/71, this is the case for persons to whom the legislation of a Member State ceases to be applicable – for instance because they stop working, either temporarily or permanently – without the legislation of another Member State becoming applicable in accordance with another provision of Title II. The date and the conditions on which the legislation of a Member State ceases to be applicable are determined in accordance with that legislation.⁵

² In *Government of the French Community and Walloon Government vs. Flemish Government* (C-212/06), the application of the residence condition for affiliation to the Flemish care insurance as regards certain persons living in the Walloon region (i.e. Belgians who made use of their right of free movement as well as other EU citizens) was set aside on the basis of Articles 39 and 43 EC. See H. VERSCHUEREN, “La régionalisation de la sécurité sociale en Belgique à la lumière de l’arrêt de la Cour de Justice européenne portant sur l’assurance soins flamande”, *Revue belge de la sécurité sociale* 2008, 173-228.

³ F. PENNING, “Co-ordination of social security on the basis of the State-of-employment principle: time for an alternative?”, *Common Market Law Review* 2005, 68.

⁴ See e.g. *Adanez-Vega* (C-372/02), para 25.

⁵ *Kuusijärvi* (C-275/96), para 39-40. Article 13(2)(f) provides that “a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the foregoing subparagraphs or in

As regards a specific category of economically non-active persons, i.e. *wholly unemployed frontier workers*, Title III of Regulation 1408/71 contains specific rules determining the applicable legislation in relation to sickness benefits (Article 25(2)), invalidity benefits (Article 39(6)), unemployment benefits (Article 71(1)(a)(ii)) and family benefits (Article 72a). These provisions also have the effect of designating the legislation of the State of residence as the applicable legislation, the benefits concerned being provided by, and at the expense of, the legislation of the country of residence⁶.

Such specific rules determining the legislation applicable also exist as regards pensioners in relation to family benefits (Article 77 e.s. of Regulation 1408/71). Together with the provisions concerning sickness benefits for pensioners (Articles 27-28a), these rules seek to prevent, broadly, that the State of residence, in which the pensioner never worked, has to bear the costs of providing the benefits concerned.

Under Regulation 883/2004 persons who are economically non-active and therefore not covered by its Article 11(3)(a) to (d), shall be subject to the legislation of the Member State of residence (Article 11(3)(e)). However, according to Article 11(2) persons receiving cash benefits, because or as a consequence of their activity as an employed or self-employed person, shall be considered to be pursuing the said activity – and the legislation of the Member State of that activity is applied – except if they receive an invalidity, old-age or survivor's pension or a pension in respect of accidents at work or occupational diseases or sickness benefits in cash covering treatment for an unlimited period. Thus, not all forms of inactivity make the legislation of the Member State of residence applicable. This is not the case for instance for temporary sickness. It is important to note that Article 11(3)(e) also states that the application of the legislation of the Member State of residence is without prejudice to other provisions of the Regulation that guarantee the person concerned benefits under the legislation of one or more other Member States.

It may also be noted that the connection of (wholly) unemployed persons with the legislation of the State of residence has been reinforced and made more explicit under the new Regulation. Article 11(3)(c) now clearly states that persons receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State as regards all other benefits⁷.

3) A specific coordination system based on the application of the legislation of the State of residence relates to the nature of certain benefits, halfway between social assistance and social security benefits, known as “*special non-contributory benefits*”. Under the coordination system introduced for these benefits in 1992, the benefits listed in Annex IIa are provided exclusively under the legislation of the State of residence, by and at the expense of the institution of the place of residence (see *infra*).

II.1.c. The nature of the rules determining the legislation applicable

accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone”.

⁶ The general conflict rules of Regulation 1408/71 are laid down in Title II. However, in certain areas those general rules governing connecting factors are subject to exceptions. The application of those special rules nonetheless presupposes the prior determination of the applicable legislation in accordance with the provisions of Title II: see *Adanez-Vega* (C-372/02), para 19.

⁷ For a detailed discussion of the unemployment chapter of Regulation 883/2004, see R. CORNELISSEN, “The new EU coordination system for workers who become unemployed”, *European Journal of Social Security* 2007, 3, 187 e.s.

The rules on the determination of the legislation applicable are not intended to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme or to be entitled to a benefit. It is for the legislature of each Member State to lay down those conditions.⁸ Therefore, the fact that, under the coordination Regulations, a person is subject to the legislation of a particular Member State does not grant him/her an automatic entitlement to draw benefits at the expense of that State nor even necessarily implies that that person comes within the personal scope of that State's social security scheme(s). S/he will do so only if s/he satisfies the (non-discriminatory) conditions laid down to that effect in that State's legislation (e.g. earnings below a certain level; age).

II.1.c.i) Strong effect

When the Member States lay down the conditions governing affiliation to their schemes, they are under an obligation to comply with the provisions of the Community law in force. In particular, those conditions may not have the effect of excluding from the scope of the legislation at issue persons to whom it applies pursuant to Regulation 1408/71. According to well-established case law of the ECJ, the provisions of Title II of Regulation 1408/71 "constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its legislation so far as the persons who are subject thereto and the territory within which the provisions of national law takes effect are concerned"⁹. This is referred to as the strong effect of the provisions of Title II. In concrete terms, this means that national affiliation conditions are overridden if their application is such as to deprive the conflict rule of all practical effect. This is the case, as regards persons referred to in Article 13(2)(a), for a residence condition, the effect of which is to render the conflict rule laid down by that provision effectively meaningless¹⁰.

On the other hand, when the *effet utile* of the rule is not at stake, the national affiliation condition, even if it is of a territorial nature, is upheld. The ECJ has stated in *Kuusijärvi* that the fact that the legislation of a Member State makes the right of a person who has ceased all occupational activity in its territory, and who thus no longer satisfies the conditions laid down in Article 13(2)(a) of Regulation 1408/71, to be or to remain affiliated to that Member State's social security scheme conditional upon his residing in its territory is not such as to deprive Article 13(2)(f) of the Regulation of its practical effect or to exclude that person from the application of all social security legislation, in particular that applicable by virtue of Regulation 1408/71. On the contrary, Article 13(2)(f) is specifically intended to govern such a situation and, to that end, in the case of a person who is no longer subject to any legislation applicable by virtue of the other provisions of Title II of Regulation 1408/71, declares applicable to that person the legislation of the Member State in whose territory he resides. Article 13(2)(f) applies to a person who continues to reside in the Member State in which s/he was previously employed or who transfers his/her residence to another Member State. According to the ECJ, that Article does not preclude the legislation of a Member State from making the right of a person who has ceased occupational activity in that State to remain subject to its legislation dependent on his/her continued residence there.¹¹

The question whether Article 13(2)(f) can be interpreted as allowing the new State of residence to subject the right to affiliate to its system to a residence requirement has not yet been considered by the ECJ and therefore still remains open.

⁸ *Schmitt* (29/88); *Kits van Heijningen* (C-2/89), para 19; *Kuusijärvi* (C-275/96), para 29 and *Van Pommeren-Bourgondiën* (C-227/03), para 33.

⁹ *Luijten* (60/85), para 14.

¹⁰ *Kits van Heijningen* (C-2/89), para 19-21.

¹¹ *Kuusijärvi* (C-275/96) para 32-34; 50-51.

It follows from the above that, if a person referred to in Article 13(2)(f) resides in the territory of a State where access to benefits is based on employment or contributions, s/he will be left without social security cover. If, however, residence is in a State where the right or the obligation to become affiliated to a social security scheme is based only on residence, that residence in principle creates access to social security and – as the case may be – entitlement to benefits.

The question arises how national residence concepts interact with the Community conflict rules in cases where these rules prescribe the *lex loci domicilii*. What if the national residence concept is more stringent than the Community concept of habitual residence (cf. *infra*)? An example is where a person who, having ceased all professional activity in State A, goes to establish residence in State B. Even though s/he has the intention of establishing his centre of interests in the latter State, it might happen that s/he does not fulfil the national concept of residence used as a condition for affiliation to the social security scheme of the new State of residence.

In this respect, it should be noted that Article 13(2)(f) *in fine* stipulates that the legislation of the State of residence applies “in accordance with the provisions of that legislation alone”. Notwithstanding this phrase, however, it is not certain that State B can actually apply this condition in its legislation. National conditions can only be applied if they are in keeping with the fundamental freedoms and principles of Community law, including the principle of equality of treatment. If the condition concerned were to be proved to be indirectly discriminatory – as it could be more easily met by State B nationals – and this effect could not be neutralised by the coordination rules, notably the principle of aggregation if a defined period of residence is required (cf. *infra*), then the rules of the Treaty on the fundamental freedom of movement, as interpreted by the ECJ, come into play, requiring the national rule to be objectively justified and proportionate¹².

In Article 11(3)(e) of Regulation 883/2004, the reference to national legislation is abolished¹³.

II.1.c.ii) Exclusive effect

The rules on the determination of the legislation applicable also have *exclusive effect*. Persons, to whom Regulation 1408/71 applies, are subject to the legislation of a single Member State only. The concurrent application of the social security legislation of two Member States, on the basis of national law¹⁴, is in principle excluded. If the legislation of a Member State is applicable to a person, s/he may only rely on that legislation, even if there would be greater entitlement under the legislation of another Member State. Application of these rules may thus prove disadvantageous to insured persons, in the sense that they may find themselves deprived of the coverage of a system under which, on the basis of national law, they could have received more generous benefits or even benefits *tout court*. It may be noted that since the *Ten Holder* decision of the ECJ the *Petroni* principle, according to which the application of Regulation 1408/71 cannot entail the loss of rights acquired exclusively

¹² On the ECJ's case law regarding the discriminatory character of requirements of a minimum period of residence in national legislation, see below sub III.1.

¹³ This omission might be interpreted as indicating that a Member State must consider persons resident in its territory within the meaning of Community law, as also being resident for the implementation of its national (residence-based) legislation. Whatever the case may be, it surely lends support to the view that Member States must apply residence clauses in their legislation in accordance with the general principles of Community law including the prohibition of indirect discrimination on grounds of nationality and of obstacles to free movement.

¹⁴ Regulation 1408/71 indeed contains two minor exceptions to the principle that the legislation of a single Member State applies: see articles 14c(b) and 14f.

under national legislation, does *not* apply to the rules for determining the legislation applicable¹⁵.

Nevertheless, no empirical research has been carried out as to what extent migrant workers, on account of the exclusive effect of the rules determining the legislation applicable, actually lose out on benefits to which they would be entitled under national law of the State of residence, or, conversely, to what extent the State of residence provides benefits in accordance with the *Petroni* principle when applying the rules for determining the applicable legislation.¹⁶

It should also be pointed out that the exclusive effect of the rules determining the legislation applicable is not absolute. The ECJ has recently held that the application of provisions of another system of legislation is not always precluded¹⁷.

In its ruling of 20 May 2008 in *Bosmann* (C-352/06), the ECJ decided that the Member State of residence, even if it is not the competent Member State, cannot be deprived of the right to grant child benefit to those resident within its territory. The ECJ ruled that, while, under Article 13(2)(a) of Regulation 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if s/he resides in the territory of another Member State, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting, pursuant to its legislation, child benefit to that person.¹⁸

It is not clear whether the *Bosmann* ruling means the end of the exclusive effect of the rules in the coordination instruments on the determination of the legislation applicable.

The aim of the provisions of Title II, which is notably to prevent more than one system of national legislation from being applicable and to avoid the complications which may result from that situation, is not as such frustrated by allowing the State of residence, whose legislation is not applicable, to grant the benefits which its legislation provides for, at least not if it is accepted that that State cannot be obliged to pay benefits and that the beneficiary cannot be held to pay contributions to its institutions. In *Bosmann*, the ECJ stated very clearly that the State of residence cannot be obliged on account of Community law to pay benefits. The ECJ did not consider the question whether the beneficiary could be required to pay contributions to its institutions.

This is all the more so if the legislation which is designated as applicable does not provide for an entitlement to benefits (in this case due to the age of the children). In addition, it may well not be coincidental that this judgment is concerned with the area of family benefits, where the effect of the special overlapping rules is to derogate *de facto* from the exclusive character of the rules governing the legislation applicable. This is especially so in the case of overlapping entitlements of the same person, as would have been the case of Ms. Bosmann had there been entitlement under Dutch legislation. In that case, under Article 10(1)(a) of Regulation 574/72, the German institution would have been obliged, where applicable, to top-up the Dutch family benefits¹⁹.

¹⁵ See e.g. *Ten Holder* (302/84), para 22.

¹⁶ Some examples of these situations are to be found in the trESS-reports.

¹⁷ *Laurin Effing* (C-302/02), para 39.

¹⁸ *Bosmann* (C-352/06), para 31 and 33.

¹⁹ Some commentators defend the view that there was actually a situation of overlapping entitlements in the *Bosmann* case, with this proviso that the entitlement under Dutch legislation equalled nil, resulting in the complete “top-up” by the German institution. This view, however, seems difficult to reconcile with the ECJ’s statement that the said institution was not obliged under Community law to pay child benefit.

Bearing in mind that the Regulation itself derogates from the exclusive character of the provisions of Title II as regards family benefits, the question arises whether the *Bosmann* case law is transposable to other social security branches.

There are similar situations involving other social security benefits granted solely on the grounds of residence. Do the Title II rules preclude the State of residence of the family member of a migrant worker to pay, for instance, long-term care benefits in cases where the legislation of the competent State does not provide for such benefits and an entitlement exists under the legislation of the former State?

The question can be posed in more general terms: when the coordination rules determine that an employed or a self-employed person is subject to the legislation of the competent State, and residence is in another State, does the Regulation then prevent the latter State from granting that person the benefits to which s/he is entitled under that State's legislation? If an affirmative answer is necessary to avoid the complications which may result from the application of two sets of legislation, does the same apply in cases where there is no entitlement to a similar benefit under the competent legislation? Here, a positive answer would be difficult to reconcile with the objective set out in Article 42 EC and hard to explain to the European citizen.

In *Bosmann*, the ECJ explicitly stated that Community law did not require the German authorities to grant Ms. Bosmann the family benefit in question (para 27). One may speculate whether the ECJ intended this statement to be so general as to refer to the whole of Community law, or rather intended it to be limited to the Regulation only. As will be shown *infra*, in cases such as the one at issue in *Bosmann*, and by extension in all cases where an insured person has an entitlement to benefits under the legislation of the State on whose territory s/he stays or resides and which is not the applicable legislation, the person concerned might nevertheless have a claim under Articles 18 jo. 12 EC or Article 24 of Directive 2004/38/EC.

II.2. The substantive coordination rules

II.2.a. Waiving of residence clauses

II.2.a.i) General principle

The application of the legislation of the competent State – i.e. usually the State of employment – does not mean that this State may apply residence clauses contained in its legislation. The principle of export of benefits (or waiver of residence clauses) guarantees the payment by former States of employment of cash benefits wherever the beneficiary (or the members of her or his family) resides in the Union. This principle is enshrined in Article 10 of Regulation 1408/71 (as regards all long-term cash benefits) and Article 7 of Regulation 883/2004 (as regards all cash benefits).²⁰ It is clear from this principle not only that the

²⁰ See however the judgement of the EFTA-Court of 3 May 2006 in Case E-3/05 (EFTA Surveillance Authority v. Norway) on the Norwegian “Finnmark Supplement”. This benefit is a family allowance granted to parents residing with their children in the county of Finnmark or in one of seven municipalities in the county of Troms, adjacent to Finnmark. The Finnmark supplement was one of many measures introduced in the late 1980's in order to reverse a negative trend of lack of jobs, failing business, lack of qualified personnel and decreasing population figures that prevailed in the region. The EFTA Court considered the regional residence requirement for the granting of the Finnmark supplement to be indirectly discriminatory against migrant workers but that it is objectively

person concerned retains the right to receive benefits acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that s/he may not be prevented from acquiring such a right merely because he does not reside in the territory of the state in which the institution responsible for payment is situated²¹.

By application of the principle of waiving of residence clauses a great number of economically active and non-active persons, in particular frontier workers and pensioners, are therefore guaranteed not to lose their benefits from other Member States because they reside in the territory of a Member State in which they do currently not work or have never worked.

Even though they are not mentioned in Article 10 of Regulation 1408/71, family and sickness benefits are also exportable, although in accordance with specific rules²².

In all cases, the right to export benefits is contingent upon the person concerned being entitled to the benefits under the legislation of the competent State.

II.2.a.ii) Limits and exceptions

In some cases, the principle of exportability of cash benefits is not accepted.

The export of unemployment benefits is limited under Regulation 1408/71 (Article 69 and 71) as it will be under Regulation 883/2004 (Article 63-65). Changing State of residence could therefore mean loss of benefit. Moreover, the new Member State is only responsible for paying unemployment benefits to the person concerned after having worked in the territory of that State (Article 67(3) Regulation 1408/71 and Article 61(2) of Regulation 883/2004).

Furthermore, the principle of exportability does not extend to non-contributory, tax-financed benefits, which have elements of both social security and social assistance and which are closely related to the economic and social situation in the Member State concerned. In response to the ECJ's case law of the 1970s and 1980s, the Community legislator

justified on grounds of promoting sustainable settlement in the region. For this court the contested measure therefore does not violate Regulation 1408/71, in particular Articles 3 and 73 thereof. Compare *Government of the French Community and Walloon Government vs. Flemish Government* (C-212/06).

²¹ *Roosmalen* (300/84), para 39.

²² Insofar as *family benefits* are concerned, these are laid down in Articles 73 and 74 of Regulation 1408/71 and in Article 67 of Regulation 883/2004 with regard to family members not residing in the competent State. According to a consistent body of case law of the ECJ, Article 73 is intended to prevent Member States from making entitlement to, and the amount of, family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement (*Maaheimo*, C-333/00, para 34). Pensioners are entitled to receive family benefits according to the legislation of (one of the) Member State(s) competent for her/his pension, independent of her or his family members' residence (Articles 77 and 79 of Regulation 1408/71 as regards family allowances and some supplements to pensions; Article 67 of Regulation 883/2004).

Sickness cash benefits are also exportable. The Regulations contain provisions to the effect of guaranteeing workers residing in a Member State other than the competent State the grant of the sickness cash benefits provided for by the applicable legislation. The same holds for the members of the family of the worker insofar as they are not entitled to those benefits under the legislation of the State of residence (article 19 of Regulation 1408/71). Furthermore, special provisions grant pensioners and their family members the payment of sickness cash benefits, in the State where they reside, by the institution of the Member State (or one of the Member States) competent in respect of pensions (Articles 27 e.s. of Regulation 1408/71).

intervened in 1992 by creating a separate coordination system for these benefits by introducing Articles 4(2)a and 10(a) and Annex IIa in Regulation 1408/71.²³ For the benefits listed in Annex IIa, Member States could apply a residence condition preventing their export. The justification for limiting the export of these benefits was mainly that they were not based on the payment of contributions by the beneficiary and that they were meant to guarantee a level of subsistence taking into account the cost of living and integration in a particular Member State. Therefore the Member State of residence shall grant these benefits in accordance to its legislation only to residents, provided that such benefits are listed in Annex IIa (Article 10a Regulation 1408/71). Taking into account more recent case law of the ECJ²⁴, Regulation 647/2005²⁵ introduced into Regulation 1408/71 a new definition, which is already integrated in Regulation 833/2004 (Article 70). These benefits are now called “special non-contributory cash benefits”, referring to the link with the social and economic situation and social environment in the Member State concerned.²⁶ At the same time, the list of benefits in Annex IIa was completely revised²⁷.

Interestingly, in the recent *Hendrix* judgement, the ECJ made the application of a residence condition for entitlement to a special non-contributory benefit to a person still economically active in the Member State from which s/he claims such a benefit, subject to the assessment of it being objectively justified and proportionate to the objective pursued. For the ECJ, the application of such a condition must not entail an infringement of the rights which a person in the situation of Mr. Hendrix derives from freedom of movement for workers which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. Referring to the national legislation of the State from which the benefit was claimed, which expressly provided for an exception to the residence condition when it leads to an “unacceptable degree of unfairness”, the ECJ held that it is for the national court to take account of the fact that Mr. Hendrix has maintained all of his economic and social links to the Member State of origin.²⁸ The question is still debated whether the ECJ would have decided in the same way had the legislation at issue not provided for an exception to the residence clause.

II.2.b. Protection of rights in the process of being acquired / aggregation of periods

Qualifying periods are a common condition for entitlement to various types of benefits in national legislations. In many cases, the right to benefits is contingent upon the person having paid contributions, having worked or having resided, for a defined period of time, under the legislation under which benefits are claimed.

Such minimum periods of affiliation for entitlement restrict the freedom of movement and are, moreover, indirectly discriminatory, in that they put at a disadvantage persons who have made use of their freedom of movement, particularly non-nationals. For example, the condition that a person is only entitled to unemployment benefits if, after fulfilling the other

²³ See Regulation 1247/92, OJ L136, 19.5.1992, p. 1.

²⁴ Such as *Jauch* (C-215/99) and *Leclere* (C-43/99).

²⁵ OJ L117, 4.5.2005, p. 1.

²⁶ See on the link with the social and economic situation and social environment in the Member State concerned and on the objective of guaranteeing a level of subsistence taking into account the cost of living and integration in a particular Member State *Skalka* (C-160/02), *Kersbergen-Lap* (C-154/05) and *Perez Naranjo* (C-265/05).

²⁷ However, this initiative did not stop legal and political controversy in defining the nature of special non-contributory benefits. Indeed at the Commission's request, the EJC annulled part of Regulation 647/2005, in particular the listing in Annex IIa of one Finnish (Child care allowance), one Swedish (Disability allowance and care allowance for disabled children) and three UK benefits (Disability Living Allowance, Attendance Allowance and Carer's Allowance). See *Commission v. European Parliament and Council* (C-299/05).

²⁸ *Hendrix* (C-287/05), para 55-57.

conditions, she has contributed to the relevant State's unemployment scheme for a period of 12 months is more easily met by nationals of that State than by citizens of another State. The same goes for a national rule reserving entitlement to a pension to persons who have completed a specific number of residence periods under that State's legislation. What is more, persons who exercised their right to free movement and have been insured in different Member States risk not being able to claim benefits in any of these States, as they fail to satisfy the respective qualifying periods.

Taken by itself, the requirement to have completed a defined period of time in order to be entitled to benefits does not restrict freedom of movement nor affect non-nationals more than nationals. The restrictive and discriminatory effect of this requirement stems from the - nationally construed - requirement to have completed periods *under the legislation of the State concerned*.

The aggregation of periods, which is a basic principle of social security coordination and enshrined in Article 42 EC, effectively neutralises the restrictive and discriminatory effects of time-conditioned requirements of contributions, (self-)employment and residence. It obliges the institutions of Member States whose legislation makes the entitlement to benefits conditional upon completion of periods, to take account, to the extent necessary, of periods completed under the legislation of any other Member State, as if they were periods completed under their own legislation. The aggregation principle is an instrument for putting together the parts of the career of a migrant worker for the purposes of assessing entitlement to benefits, so as to ensure that the exercise of the right to freedom of movement does not have the effect of depriving a worker of social security advantages which s/he would have been entitled to if s/he had spent his/her working life in only one Member State.

Under Regulation 1408/71, aggregation of periods applies to different benefits, as laid down, in particular, in Article 10a (special non-contributory benefits), Article 18 (sickness and maternity), Article 38 (invalidity), Article 45 (old-age and survivors), Article 64 (death grants), Article 67 (unemployment benefits) and Article 72 (family benefits). With the exception of the two latter benefits, the aggregation of periods applies in cases where "the acquisition, retention or recovery of the right to benefits is conditional upon the completion of periods of residence"²⁹. For the definition of periods of insurance, (self-)employment and residence, Article 1 of the Regulation refers back to the legislation under which they were completed [subparagraphs (r), (s) and (sa) respectively].

Even though aggregation is one of the basic principles of social security coordination, there seems to be, perhaps surprisingly, still some uncertainty surrounding its concrete implementation. An important question is whether the institution of the State where benefits are claimed has to take account, for the purposes of assessing entitlement to those benefits, only periods completed in another Member State which are of the same nature as those required by the legislation it is applying, or whether it has to consider any period which is relevant for social security purposes, regardless of its nature, either in general or only for the particular type of benefit which is claimed, under the legislation where it was completed.

The answer to this question impacts greatly on the situation of migrant persons. Consider the case of a migrant worker who does not meet the condition of having completed a defined period of residence in order to be able to claim a benefit in State A. The person has previously worked and paid contributions under the legislation of State B – which does not

²⁹ That the Regulation does not provide for the aggregation of periods of residence for the purposes of entitlement to unemployment benefits and family benefits might very well stem from the simple fact that national unemployment and family benefit schemes in the EU do not have minimum periods of residence as a condition for entitlement and, hence, there is no need for such aggregation provisions (MISSOC Tables 1/1/2008).

provide for the concept of “periods of residence” but of “periods of insurance”. If it is accepted that the institution of State A has to take into consideration only periods of residence within the meaning of Article 1(sa) of the Regulation, then the aggregation principle cannot be relied on by the person concerned. Also in the opposite situation, the aggregation provision would be of little use to the person: periods of residence which the person completed in State D could not count towards meeting the qualifying condition using periods of employment in State C where benefits are claimed.

As the above examples demonstrate, interpreting the aggregation provisions as only imposing aggregation of similar periods severely limits their use and is liable to create distinctions between European citizens, depending on their country of origin.

The wording of the aggregation provisions³⁰, including that of Article 15 of Regulation 574/72, lends support to the view that the institution from which a benefit is sought is under the obligation to aggregate any period which, in the State where they were completed, gave rise to the accrual of social security rights, regardless of their nature [periods of residence, periods of insurance, periods of (self-)employment]. This interpretation is corroborated, *a contrario*, by the special provision of Article 67 of Regulation 1408/71, especially the distinction it operates in its paragraphs (1) and (2). Only this interpretation seems to be in keeping with the aim of the aggregation principle, which is to guarantee that migrant workers retain the rights and the advantages acquired and in the course of being acquired.

Whatever the case may be, it must be stressed that the fact that the Regulation’s aggregation provisions cannot, for one reason or another, be applied does not imply that the EC Treaty is not applicable. National rules making entitlement to benefits subject to having resided on the territory of the State for a specified duration of time are indirectly discriminatory and run counter the EC Treaty provisions on free movement, notably Articles 18, 39 and 43 EC, unless objectively justified and proportionate.

Finally, it must be noted in this respect that the principle of assimilation of facts does not appear to be relevant to the question at hand, in that recital 10 of Regulation 883/2004 provides that this principle should not interfere with the principle of aggregation and that “periods completed under the legislation of another Member State should therefore be taken into account solely by applying the principle of aggregation of periods”.

Article 6 of Regulation 883/2004 contains a general aggregation provision which is valid for all chapters, with special provisions applying for pensions (Articles 45 and 51) and unemployment benefits (Article 61). Under this new provision in Title I of Regulation 883/2004, residence periods will have to be aggregated for each branch. Moreover, it is also stated explicitly that aggregation has to be applied not only to help meet qualifying periods as a condition for entitlement to benefits, but also as a condition for “coverage by legislation”, i.e. affiliation to the scheme.

Different rule for special non-contributory benefits?

It is sometimes argued that, insofar as the aggregation provision of Article 10a(2) of Regulation 1408/71 is concerned, account ought to be taken of any period during which the person concerned resided on the territory of a Member State, within its Community-meaning, regardless of whether or not it was relevant for social security purposes in the State concerned³¹. This interpretation tallies with the *ratio legis* of the special coordination system

³⁰ Notably the absence of the word “respectively” after the second enumeration of the different types of periods.

³¹ This interpretation would lead to the result that qualifying conditions using residence periods would virtually always be met by persons covered by the Regulations. Failure to meet the qualifying

put in place for special non-contributory benefits, which, as a corollary of the non-exportability of these benefits, lays the full responsibility for their provision with the Member State of residence. However; this does not alter the fact that there is little textual ground for this interpretation, there being no substantial difference in wording between the aggregation provisions of Article 10a of Regulation 1408/71 on the one hand and those in Title III of the Regulation, on the other. Yet, under this general aggregation rule periods of residence should be aggregated with periods of employment or self-employment since we demonstrated above that interpreting the aggregation provisions as only imposing aggregation of similar periods severely limits their use and is liable to create distinctions between European citizens, depending on the country where they originate from.

II.3. Community-wide meaning of residence for the purpose of application of Regulation 1408/71 and Regulation 883/2004

Any residence requirement in national law must be compatible with the residence requirement as it is to be understood in the context of the application of Regulation 1408/71. This was clearly illustrated by *Swaddling*.³² The matter discussed in this case was the habitual residence requirement prescribed by the national legislation. According to the competent UK institution 'habitual residence' presupposed an appreciable period of residence in the UK in addition to the settled intention of residing there.

In its judgment the ECJ confirmed that the term 'residence' is defined in Article 1(h) of Regulation 1408/71 as meaning 'habitual residence'.³³ This definition does not mean however that the UK habitual residence test is fully in line with EC law. Indeed the ECJ considered this term in Regulation 1408/71 as having a uniform Community-wide meaning based on criteria defined in Community law and not on the criteria of the national legislation of the Member State.³⁴ A nationally defined residence concept could indeed lead to a situation where a person, despite the fact that s/he has been living all his or her life in the European Union, is not considered to be resident by the legislation of any Member State. Hence, s/he could fall between two stools with regard to the entitlement of residence based benefits such as the minimum subsistence benefits listed in Annex IIa of the Regulation.

conditions would be either on account of age (completion of a minimum residence period of x years presupposes the person concerned has reached the age of x) or residence outside the EU. The almost automatic satisfaction of qualifying conditions using residence periods leads some to argue against it, the idea being that durational residence conditions are a manifestation of a broader requirement of a degree of connection with the society of a State, to which access to that State's redistributive tax-benefit arrangements is made subject and that this reading of the aggregation principle would downgrade such conditions to mere empty boxes. This argument arises notably when benefits are at issue for which the Regulation does not provide for a calculation on the basis of the proratisation principle. An example could be the Cypriot social pension, which is an Annex IIa-benefit. Entitlement to this benefit depends, among other things, on legal residence in Cyprus for a total period of at least 20 years from the date the claimant reaches the age of 40, or for a total period of at least 35 years from the date the claimant reaches the age of 18 years (MISSOC Tables 1/1/2008). By virtue of Article 10a(2), a pensioner covered by the Regulation and having lived all of his life in different EU countries but never in Cyprus, could be entitled as from the first day of transferring her or his residence there to the full amount of this social pension, provided s/he brings the habitual centre of his or her interest to Cyprus and fulfils the other (non-discriminatory) eligibility conditions provided in Cypriot legislation.

³² *Swaddling* (C-90/97).

³³ For the purpose of applying the different provisions of Regulation 1408/71, 'residence' is different to 'stay' which is defined in Article 1(i) as meaning 'temporary residence'.

³⁴ *Swaddling*, para 28.

When it comes to Regulation 1408/71, residence has a Community interpretation. According to the ECJ, the phrase '*the Member State in which they reside*' in Article 10a of Regulation 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the employed person's family situation, the reasons which have led her or him to move, the length and continuity of his residence, the fact (where this is the case) that s/he is in stable employment and his intention as it appears from all the circumstances. For the purposes of that assessment, however, the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation 1408/71.

Despite this case law, it nevertheless remains difficult to draw up criteria which are clear enough in all circumstances to determine a person's place of residence within the meaning of Regulation 1408/71. Member States enjoy a certain margin of discretion in interpreting the notion of residence for the application of the provisions of Regulation 1408/71.

In order to overcome such problems of interpretation and implementation of Community law, the Commission put forward in its proposal for a regulation laying down the procedure for implementing Regulation 883/2004³⁵ some elements for determining the residence of a person for the application of Regulation 883/2004. The main objective of the proposed provision is clearly to avoid a person not being considered resident by any Member State. Indeed the proposed Article 11 calls upon the Member States in case of disagreement over where the residence of a person lies, to establish by common accord, the centre of interest of the person concerned. It suggests elements that should be taken account of, such as the duration and continuity of residence, the person's family ties and intentions. In its first agreement on this proposal adopted by the Council in June 2006,³⁶ it suggested introducing a recital in the regulation saying that "*Member States should co-operate to determine the residence of an individual for the purposes of this Regulation and the basic Regulation and, in cases of dispute, each Member State should take into consideration all relevant criteria to achieve that end. They may include those referred to in the appropriate Article of the Regulation*". The Council accepts the idea of the Commission to have a Community-wide notion of residence, as being the place where the centre of interest of the person concerned is situated, which should be established in such a way that the person involved does not fall between two stools or that he/she may not be considered for the purpose of applying the Regulation as being resident in more than one Member State. The latter situation could lead to situations where the persons concerned try to benefit from the social security system of several Member States.

However these provisions do not prevent further discussion on the notion of residence under Regulations 1408/71 and 883/2004, in particular in their relationship with Directive 2004/38/EC. The notion of residence under the Directive is not defined and seems to cover both short-term and long-term residence (Article 6 referring to "right of residence for up to three months", Article 7 to "right to residence for more than three months"). It remains unclear whether persons only staying in a Member State on a temporary basis, such as tourists, are subject to the provisions of Directive 2004/38/EC on the right of residence and its equal treatment provision of Article 24 (see *infra*).

II.4. Some examples of residence clauses at the national level

³⁵ COM(2006)16 of 31.1.2006.

³⁶ See Council document 9584/06 ADD1 on <http://register.consilium.europa.eu/pdf/en/06/st09/st09584-ad01.en06.pdf>.

The personal scope of the new Regulation 883/2004 covers all insured persons. It is highly probable that the entering into force of this new Regulation will have an impact on the importance of national application and implementation of the residence concepts both under Community law and under national law. It might be difficult to find elements linking a person with a social security system of a Member State other than residence in the cases where the person or his/her family member is not economically active. For employed persons and self-employed persons the professional activity creates the basis for affiliation and entitlements. For non-active persons who are not able to refer to previous activity this link is missing and the questions about membership and belonging to the society and to the social environment arise. Understanding social protection as a territorial responsibility creates a new legal framework. Directive 2004/38/EC is within this context a source of new uncertainties. It remains to be answered both by the ECJ and Community legislature whether the definition of the Community concept of residence will be affected by the Directive when it comes to social security.

In many Member States residence constitutes a key concept in national legislations' eligibility criteria for entitlement to various social benefits and constitutes a strong clause, especially in the non-contributory schemes.³⁷ The case law of the ECJ addressing Union citizenship and the free movement rights of economically non-active people suggest that national residence clauses are increasingly being challenged (cf. *infra*).

The use of national residence clauses is increasing as a way to determine access to benefits. In France, residence requirements are used for universal benefits and for means tested benefits; family benefits, universal health care (*couverture maladie universelle*), old-age minimum pension, disabled adults' allowance, occupational integration minimum income (RMI). Whereas the concept of residence was previously out of focus, it has increasingly become a sensitive and controversial subject. For a long period, there was only one legal reference addressing 'residence'.³⁸ However, by the end of the 1990s, access to several schemes was defined by 'residence'.³⁹ The residence requirement has recently been reformed.⁴⁰ The reform tightens the residence criteria and applies to health care, maternity and paternity benefits, universal health coverage, family benefits, old-age minimum pension and invalidity allowance. Residence as an eligibility criterion has come to mean 'habitual residence'. The criteria are met when the recipient is personally and effectively present on the French territory for more than 6 months a year.⁴¹ The eligible person is obliged to inform the competent institution of any changes of residence⁴² and the competent institution may check whether the person actually resides at his stated place of residence.⁴³

Residence criteria have also been tightened in Luxembourg for some social benefits. This has taken place in the case of unemployment benefits.⁴⁴ In the case of an open-ended contract a jobseeker must have his/her permanent residence in Luxembourg at the moment of notifying redundancy. In the case of a fixed-term contract, s/he must have her or his permanent residence in Luxembourg for at least six months before the end of the contract. In the preamble of the law, the Government explained the necessity of reform by more and more frontier workers transferring their residence to Luxembourg during the period of notice in order to be entitled to Luxembourg unemployment benefits. Furthermore, residence

³⁷ See Annex describing residence in national schemes.

³⁸ Conseil d'Etat, Opinion, 8 January 1981.

³⁹ For example Circular 98/678, 17 November 1998 defined the concept of residence applicable to non-contributory benefits as the proven effective residence in France.

⁴⁰ Decree 2007-354, 14 March 2007.

⁴¹ Article R115-6 of the Social Security Code.

⁴² Article R115-7 of the Social Security Code.

⁴³ Article R161-1 of the Social Security Code.

⁴⁴ Mémorial A 2006 No239, p. 4710, Doc. Parl. 5611, 29 December 2006.

criteria have been extended in Luxembourg for family allowances. The permanent residence condition for the child has been made more explicit by and is accepted as fulfilled if the adult with whom the child lives has their permanent residence in Luxembourg.⁴⁵ The permanent residence of the adult is assessed on the basis of a set of conditions and differs between non-EC nationals and others. Also for the Luxembourg guaranteed minimum income (RMG), i.e. the social assistance scheme, residence conditions have been redefined and tightened.⁴⁶ The entitlement to RMG is made dependent upon the person having a residence permit, having set up permanent residence in Luxembourg and is actually residing in Luxembourg.

It should be noted that apparently some Member States use residence criteria for entitlement to social benefits, but do not have a legal definition of what qualifies as 'residence'. This is reported in the case of Portugal. The lack of a definition undermines transparency. Secondly, some Member States have introduced the provisions of Directive 2004/38/EC into their national social security legislation as a national condition for affiliation or entitlement. This is the case in Sweden. It is too early to conclude how this will affect the implementation of the coordination Regulation.⁴⁷

II.5. Interaction of national residence clauses with the coordination rules

Above, we saw how residence as a national condition for social security purposes is dealt with by the coordination rules. In their practical application in cross-border situations, such conditions may restrict free movement for they tend to affect migrants more than people who have not moved.

Depending on the circumstances, residence clauses as a condition for affiliation to a scheme are overridden by the (strong effect of the) rules on applicable legislation – that is when the practical effect of these rules so dictates. This is the case notably when they subject economically active persons to the legislation of the State of activity.

Residence conditions for the acquisition or retention of the right to benefits can be overruled by the general principle of waiving of residence clauses.

Durational residence requirements, either as a condition for affiliation or entitlement, must be applied in accordance with those other general principles of social security coordination, aggregation of periods and non-discrimination on grounds of nationality.

This means that, when the *lex loci laboris* principle applies, the competent State cannot apply, vis-a-vis insured persons residing in another Member State, any residence clause as a condition for affiliation to its benefit schemes or for entitlement to its benefits (save requirements of time-conditioned, past residence, with the application of the principles of aggregation and non-discrimination).

When applicable legislation is determined on the basis of the *lex loci domicilii* principle, national residence requirements in the legislation of the competent State must accord with the *Swaddling* concept of residence. Persons who are "*Swaddling* resident" are entitled to benefits provided they satisfy the (non-discriminatory) conditions for entitlement laid down in that legislation. Insofar as these include residence requirements, they will usually be covered by the *Swaddling* concept residence. Durational residence requirements must be dealt with via the aggregation principle and the principle of non-discrimination.

⁴⁵ Change of law, 21 November 2002.

⁴⁶ Reform of law 29th April 1999, Mémorial A 1999 No 60, p. 1390, Doc. Parl. 4229, 29 April 1999.

⁴⁷ More information on national residence clauses can be found in the tables annexed to this report.

It may be that the legislation of the State of residence makes entitlement to benefits subject to *actual presence* on the territory. Such conditions may be very problematic for posted workers, who are, in the absence of proof to the contrary, presumed to reside in the competent (sending) State⁴⁸. The Regulation does not contain specific rules to counter that particular situation. However, as such conditions restrict freedom of movement of workers, they must be disregarded unless they have objective justification⁴⁹.

It may also be that the legislation of the residence State that is designated as applicable makes entitlement to benefits subject to *legal residence* on the territory. Again, the Regulation does not provide for specific rules in this case. In fact, the concept of legal residence – i.e. residence in accordance with the national immigration rules as harmonised by European legislation, including Directive 2004/38 – is completely absent in the Regulation, which embraces a factual concept of residence. Once more, however, such conditions are to be assessed under the general framework of equal treatment and freedom of movement; such conditions by definition only affect non-nationals, they can only be applied if objectively justified and proportionate to the aim pursued.

III. RESIDENCE AND ACCESS TO SOCIAL BENEFITS IN OTHER PARTS OF COMMUNITY LAW, INCLUDING DIRECTIVE 2004/38/EC

III.1. Access to social benefits on the basis of the free movement of workers (Article 39 EC – Regulation 1612/68)

The free movement of workers is one of the four fundamental freedoms guaranteed by the EC Treaty. It is intended to facilitate the pursuit by Community nationals of occupational activities of all kinds throughout the Community, and it precludes measures which might place Community nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. Article 39 EC implies the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work.

Regulation 1612/68 implements the principle of equal treatment in the context of the free movement of workers. Regulation 1612/68 guarantees migrant workers, including frontier workers, equal treatment with national workers as regards all social advantages. The concept of "social advantage" in particular has given rise to a large body of ECJ case law. The ECJ has always ruled that this concept cannot be interpreted restrictively.⁵⁰ This concept is very broad and covers not only advantages connected with contracts of employment but all advantages which a Member State provides for its citizens and which, *inter alia*, are therefore also accorded to workers. Consequently social security benefits may be regarded as "social advantages" within the meaning of Article 7(2) of Regulation 1612/68. This holds true not only for benefits covered by the material scope of Regulation 1408/71⁵¹, but also for social security benefits excluded from the scope of the coordination of Regulation 1408/71. That is the case, for example, with regard to the special childbirth or

⁴⁸ CASSTM Decision No 160 of 28 November 1995, O.J. L 49 of 28 February 1996, 31.

⁴⁹ It may be noted in this regard that also the opposite situation may occur: similar conditions in the legislation of the receiving State might lead to the situation that the posted worker is also entitled to benefits there.

⁵⁰ See *inter alia*: *Cristini* (32/75), para 12; *Schmid* (C-310/91), para 18 and *Meints* (C-57/96), para 39.

⁵¹ *Commission v Luxembourg* (C-111/91), para 21; *Schmid* (C-310/91) and *Hendrix* (C-287/05).

adoption allowances listed in Annex II, Part II of Regulation 1408/71 and therefore excluded from its scope.⁵²

The right to social advantages regardless of nationality is accorded primarily to the migrant workers themselves. But the ECJ has also recognised that their dependent children can rely on the principle of non-discrimination in Article 7(2) Regulation 1612/68 in order to claim a benefit provided for by the legislation of the Member State concerned, the enjoyment of which constitutes a social advantage for the worker⁵³. It should also be pointed out that the principle of non-discrimination on grounds of nationality in respect of social advantages can also be invoked by self-employed persons and their children⁵⁴.

On several occasions, the ECJ has relied on Article 7(2) Regulation 1612/68 to qualify as indirectly discriminatory residence requirements contained in the legislation of the State of employment. This was the case, for instance, as regards: the requirement that claimants must have been resident for at least one year in order to be entitled to a parental allowance and a childbirth allowance⁵⁵; a residence condition for a career-interruption benefit⁵⁶; a condition relating the duration of residence (5 years) for the grant of guaranteed minimum income⁵⁷; a residence condition for a special non-contributory benefits as far as economically active beneficiaries are concerned⁵⁸; and the requirement, for being entitled to a child-raising allowance of having a permanent or ordinary residence in the State in which a migrant worker is carrying on an occupation⁵⁹.

However, in *Geven* (C-213/05) the ECJ considered Article 7(2) Regulation 1612/68 as not precluding the exclusion, by the national legislation of a Member State, of a national of another Member State who resides in that State and is in minor employment (between 3 and 14 hours a week) in the former State from receiving a social advantage such as the German child-raising allowance on the ground that s/he does not have his permanent or ordinary residence in the former State. In this judgement the ECJ referred to the fact that under the German legislation, residence was not regarded as the only connecting link with the Member State concerned, and a substantial contribution to the national labour market also constituted a valid factor of integration into the society of that Member State. For the ECJ, in those circumstances, the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned is capable of constituting a legitimate justification for a refusal to grant the social advantage at issue. (para 25-29). It seems that in this judgement the ECJ, by allowing the legislation of the State of employment to require a frontier worker to demonstrate a degree of integration into its society, is departing from previous case law mechanically applying the equal treatment provisions to migrant workers *vis-à-vis* social rights of the Member State in the territory of which they exercise their economic activity. The underlying idea and the terminology used in *Geven* – which

⁵² In *Leclerc* (C-43/99), the Court recognised that such exclusion was not in itself incompatible with the EC Treaty. But it added that this exclusion does not have the effect of discharging Member States from the need to ensure that no other rule of Community law, deriving in particular from Regulation 1612/68, precludes the imposition of a residence condition. In concrete terms, it is therefore necessary to examine whether these special allowances, which undoubtedly constitute a social advantage within the meaning of Article 7(2) of Regulation 1612/68, must not be paid irrespective of the claimant's place of residence.

⁵³ *Deak* (94/84), para 24; *Lebon* (316/85), para 12; *Schmid* (C-310/91), para 23 and *Meeusen* (C-337/97), para 19.

⁵⁴ *Commission v Luxembourg* (C-111/91), para 18.

⁵⁵ *Commission v Luxembourg* (C-111/91).

⁵⁶ *Commission v. Belgium* (C-469/02).

⁵⁷ *Commission v. Luxemburg* (C-299/01).

⁵⁸ *Hendrix* (C-287/05) (in conjunction with Article 39 EC). See also above.

⁵⁹ *Hartmann* C-212/05.

effectively constitutes the reverse situation of *Hendrix* – reflect the case law relating to Article 18 EC.

The ECJ has recognised that the general principle of prohibition of discrimination on grounds of nationality in respect of access to social benefits can also be invoked by relying directly on Article 39(2) EC. With regard to residence clauses this was for instance the case in *Pinna* (41/84) on family benefits and, more recently, in *Collins* (C-138/02). In the latter case, the UK authorities refused payment of Jobseeker's Allowance because the applicant could not be regarded as habitually resident in the UK since he had not been resident for an appreciable period of time. The ECJ identified this habitual residence test as being indirectly discriminatory on grounds of nationality (para 65), but then regarded it as legitimate for a Member State to grant such an allowance only after it has been possible to establish that a genuine link exists between the person seeking work and the employment market of that State (paras 69-70). The ECJ went on to note that, while a residence requirement is, in principle, appropriate for the purpose of ensuring such a connection, if it is to be proportionate it cannot go beyond what is necessary in order to attain that objective, which implies that its application must rest on clear criteria known in advance and provision must be made for the possibility of a means of redress of a judicial nature (para 72). *Collins* sets important criteria of proportionality, transparency and judicial protection which must be recognised by a national legislation using residence criteria for access to social benefits, at least in cases outside the scope of the coordination Regulations⁶⁰.

In *Petersen* (C-228/07), the ECJ declared incompatible in principle with Article 39 EC an Austrian residence condition preventing the exportability of an unemployment benefit within the meaning of Regulation 1408/71 – in particular an advance payment paid to applicants of invalidity benefit who are unemployed. According to the ECJ, the residence condition for the grant of the benefit at issue was indirectly discriminatory, in that it could be more easily met by national workers than by those from other Member States, since the latter workers, particularly in the event of unemployment or invalidity, tend to leave the country in which they were formerly employed to return to their countries of origin. The Austrian government did not attempt to provide objective justification for the residence condition – which left the ECJ no choice than to condemn it – but nevertheless indicated that, having regard to the specific characteristics of the benefit at issue, it would fall foul of the proportionality test.

III.2. Access to social benefits on the basis of Union citizenship

Recent years have seen the emergence of a body of case law in which the ECJ has granted, directly on the basis of the EC Treaty provisions, in particular on European citizenship (Articles 17 and 18 EC), entitlement to social benefits in the Member State of residence or even the right to export benefits from the previous Member State of residence.

III.2.a. Access to social benefits in the State of residence

The initial impetus was given by the ECJ ruling in *Martinez Sala* (C-85/96). The ECJ recognised that nationals of a Member State lawfully residing in another Member State come within the scope of EC law and its rights and duties, including the right in Article 12 EC not to suffer discrimination on grounds of nationality. A non-contributory child-raising allowance was considered by the ECJ to fall within this scope and therefore it concluded that a

⁶⁰ Indeed, Mr. Collins could not, on account of his atypical migration history, rely on Regulation 1408/71. Had he been able to do so, it seems that he could have laid claim to the Jobseeker's Allowance – which is an Annex IIa benefit – upon proof of his 'Swaddling residence' in the UK, in accordance with Article 10a.

condition in German law for the acquisition of this benefit which was only applicable to non-German nationals, was contrary to Community law.

This approach was confirmed in *Grzelczyk* (C-184/99). A French student, in the fourth year of his studies, claimed *minimex* in Belgium which is a minimum subsistence allowance. In the view of the ECJ, Mr. Grzelczyk made use of his right to move and reside freely within the Union and therefore could claim on the basis of Articles 12 and 17 EC equal treatment with the nationals of the host Member State as regards the *minimex*. For the ECJ, Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for. In this judgment the ECJ acknowledged that having recourse to the host State's social assistance schemes could be a basis for that State to withdraw the student's residence permit, but such a measure may not become an automatic consequence of his financial problems. In the ECJ's view the residence directives for non economically active persons envisage that beneficiaries of the right of residence must not become an unreasonable burden on the public finances and thus accept a certain degree of financial solidarity between nationals of the host Member State and nationals of other Member States, particularly if the financial difficulties of the student are temporary. The ECJ thereby introduced the element of proportionality to be respected by Member States when deciding on the application for a basic non-contributory social benefit by a non economically active citizen of another Member State.

In *Trojani* (C-456/02) the ECJ continued its line of reasoning in *Grzelczyk* with regard to the Belgian *minimex*, this time for a person who was non-active without being a student. The ECJ recognises in *Trojani* that a person not having sufficient resources can in principle not derive a residence right under Community law. Nevertheless if such a person has been lawfully resident in the host Member State for a certain time or possesses a residence permit he may rely on Article 12 EC also for claiming social assistance. And even if the host Member State may in such circumstances take a measure to remove this person, such a measure may not automatically be entailed by recourse to its social assistance system. The ECJ again refers to the principle of proportionality. It is also clear from this case that legal residence in a Member State, which seems to be the basis for relying on Article 12 EC, is not limited to legal residence based on EC law, but may also be legal residence based on national law.

The same line of reasoning was followed by the ECJ in cases concerning basic financial assistance for jobseekers. In *D'Hoop* (C-224/98) the ECJ denounced the linking of "tideover allowance" for young jobseekers in Belgium to the condition of having obtained the required diploma in Belgium.

In *Bidar* (C-209/03) the ECJ considered the compatibility with Article 12 EC of a refusal to grant migrant students financial assistance to cover their maintenance cost on the basis of the condition of having previously resided for at least three years in the Member State concerned (the UK). Here again such a requirement risks putting nationals of other Member States at a disadvantage and therefore needs justification. The ECJ considered it legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of the host State. This could be regarded as established after being resident for a certain length of time. The ECJ seems to regard the three-year residence requirement in the UK legislation as corresponding to the legitimate aim of ensuring a certain degree of integration.

In *Förster* (C-158/07), the ECJ confirmed that a student who is a national of a Member State and travels to another Member State to study there can rely on Article 12 EC to obtain a maintenance grant where he or she has resided for a certain duration in the host Member

State. In the ECJ's view, Article 12(1) EC does not preclude the application to nationals of other Member States of a requirement of five years' prior residence. For the ECJ, the national condition of five years' continuous residence was appropriate for the purpose of guaranteeing that the applicant for the maintenance grant is integrated into the society of the host Member State, and did not go beyond what is necessary to achieve that objective.

III.2.c. Export of benefits

Perhaps surprisingly the ECJ also applied Article 18 EC in disputes on export of benefits.

In *Tas-Hagen* (C-192/05) the ECJ interpreted Article 18 EC as precluding legislation of a Member State under which it refuses to grant to one of its nationals a benefit for civilian war victims solely on the ground that, at the time at which the application was submitted, the person concerned was resident, not in the territory of that Member State, but in the territory of another Member State. In this ruling the ECJ recognized that national legislation which places at a disadvantage certain of the nationals of the Member State concerned simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18 EC on every citizen of the Union. Such an obstacle to freedom of movement should be scrutinised under EC law even if it does as such not constitute discrimination on grounds of nationality. The ECJ admits that a condition of residence may be an expression of the extent to which such benefit recipients are connected to the society of the Member State concerned. However such a restriction can be justified, with regard to Community law, only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions. In this case the ECJ did not consider the condition of residence, such as that under consideration, to be an appropriate means by which to attain the objective sought⁶¹.

Conversely, in *De Cuyper* (C-406/04) the ECJ considered that freedom of movement and residence, conferred on every citizen of the Union by Article 18 EC, does not preclude a residence clause, which is imposed on an unemployed person over 50 years of age who is exempt from the requirement of proving that he is available for work, as a condition for the retention of his entitlement to unemployment benefit. For the ECJ, the effectiveness of monitoring arrangements which are aimed at checking the family circumstances of the unemployed person concerned and the possible existence of sources of revenue which the claimant has not declared is dependent to a large extent on the fact that the monitoring is unexpected and carried out on the spot, since the competent services have to be able to check whether the information provided by the unemployed person corresponds to the true situation. In this context a residence requirement is in line with EC law.

⁶¹ See, along the same lines, *Nerkowska* (C-499/06). In this case, the ECJ decided that Article 18 EC precludes legislation of a Member State under which it refuses to pay to its nationals a benefit granted to civilian victims of war or repression solely because they are not resident in the territory of that State throughout the period of payment of the benefit, but in the territory of another Member State. The ECJ held that, although it is true that residence constitutes a criterion capable of showing that there is a connection with the society of the Member State concerned (in this case Poland), the fact remains that, in circumstances such as those of the main proceedings, such a condition goes beyond what is necessary to achieve the objective pursued. Indeed the ECJ considered it to be relevant that Ms. Nerkowska has Polish nationality and lived in Poland for more than 20 years, during which time she studied and worked there. For the ECJ, the fact that a person is a national of the Member State granting the benefit at issue in the main proceedings and lived in that State for more than 20 years studying and working may be sufficient to establish a connection between that State and the recipient of the benefit. In those circumstances, the requirement of residence throughout the period of payment of the benefit concerned must be held to be disproportionate, since it goes beyond what is necessary to ensure that such a connection exists.

III.3. Equal treatment for social benefits under Directive 2004/38

III.3.a) Article 24 of Directive 2004/38/EC

The ECJ's case law on Article 18 EC has expanded the ambit of the right to equal treatment laid down in Article 12 EC. It follows from this case law that Member State nationals, and thus Union citizens, lawfully residing in the territory of the host State – either by virtue of Community law or national law – are entitled to invoke the right not to be discriminated against on grounds of nationality as regards all social benefits falling within the material scope of the EC Treaty.

However, the ECJ has not allowed unconditional access to social benefits in the host State. Lawful residence – on account of European or national rules – is a first condition to be fulfilled by the applicant. Moreover, and depending on the case, the person should “not become an unreasonable burden on the public finances” (*Grzelzyck*), “have a genuine link with the employment market of the State concerned” (*Collins*), or need to “demonstrate a certain degree of integration into the society of the host State” (*Bidar*). Furthermore, the ECJ acknowledges that the host Member State can put an end to the right of residence of the person concerned, even though this may not be the automatic consequence of an appeal to the social assistance system (see further on this below, sub IV).

The approach of the ECJ is incremental. Depending on the nature of the benefit, a certain degree of integration in the host Member State is required for EU citizens to be treated equally with host State nationals in terms of access to social benefits. Those rights which are liable to create a magnetic effect and impose a structural burden on the public purse, will not be acquired the moment someone crosses the border but will accumulate gradually over time⁶². This is the case for access to minimum subsistence benefits, in respect of which the ECJ accepts the legitimacy of requirements of time-conditioned residency, which it deems a suitable indicator of the degree of integration into the society of the host State⁶³.

In view of this body of ECJ case law, the Community legislature introduced in Directive 2004/38/EC some provisions on access to social benefits in the State of residence. Article 24(1) guarantees to all Union citizens, who are residing in the territory of the host Member State on the basis of this Directive, equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right is extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. It follows from the above case law of the ECJ and from the provisions of Regulation 1408/71 and 1612/68 that matters coming within the scope of the Treaty must be interpreted very broadly, including all types of social benefits as well as social assistance.

However, as regards the latter benefits, Article 24(2) stipulates that, by way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b). This provision refers to Union citizens who entered the

⁶² DAVIES, G., “‘Any Place I Hang My Hat?’ or: Residence is the New Nationality”, *European Law Journal* 2005, 55.

⁶³ See H. VERSCHUEREN, “European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems”, *European Journal of Migration and Law* 2007, 333. Compare with the benefits at issue in *Cowan* (186/87, compensation for victims of violent crime) and *Bickel and Franz* (C-274/96, language use in criminal proceedings), which were also held to be available to non-residents, in their capacity of potential service recipients.

territory of the host Member State in order to seek employment. Such persons may not be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged. Neither is the host Member State obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, and persons who retain such status and members of their families.

Questions can be raised as regards the compatibility with the EC Treaty of this provision when it comes to jobseekers, who may be refused entitlement to social assistance throughout the entire search for employment. As seen above, the ECJ has interpreted Article 39 EC in such a way that entitlement to a minimum subsistence allowance for jobseekers would have to be granted to a person who has a genuine link with the employment market of the host State – which may be established through residence for a reasonable period and the fact that the person has genuinely sought work in that State⁶⁴. On the other hand, after the recent *Förster* case (C-158/07), there seems to be little doubt possible on the compatibility with the EC Treaty provisions of the Directive's denial of entitlement to maintenance assistance for students for the first five years of residence. Besides, it would seem that the general limitation of three months as regards entitlement to social assistance seems reasonable and in keeping with the requirements stemming from the case law discussed sub III.1⁶⁵. In any case, it is plausible that the ECJ will not content itself with a mechanical application of the limitations contained in Article 24(2) but rather will interpret them in accordance with the demands of primary law, notably the principle of proportionality⁶⁶.

III.3.b) The concept of social assistance

A crucial issue in this respect concerns the scope of the concept of social assistance in Directive 2004/38/EC. The concepts of “social assistance” or “the social assistance system” are referred to on several occasions in the Directive⁶⁷ - the latter in the context of the acquisition and retention of the right of residence for economically non-active persons. The Directive does not contain a definition. One important question is whether or not this notion can be interpreted as narrowly as the concept of social assistance referred to in Article 4(4) of Regulation 1408/71? Social assistance is not defined in the coordination Regulation either, but it can be inferred from the case law of the ECJ that it refers to benefits which are granted on a discretionary basis and/or other benefits which guarantee a minimum means of subsistence to persons in need and which cannot be connected to one of the risks listed in Article 4 of Regulation 1408/71⁶⁸. Or should the notion of social assistance be interpreted more broadly, so as to encompass other non-contributory benefits, including the benefits listed in Annex IIa to Regulation 1408/71?

⁶⁴ *Collins* (C-138/02). See e.g. K. HAILBRONNER, “Union citizenship and access to social benefits”, *Common Market Law Review* 2005, 1263.

⁶⁵ H. VERSCHUEREN, “De nieuwe Europese verblijfsrichtlijn 2004/38 sinds 30 april 2006 van toepassing: het Europese burgerschap op kruissnelheid”, *Tijdschrift voor Vreemdelingenrecht* 2006, 122.

⁶⁶ Cf. *Förster* (C-158/07). See also the pending case *Vatsouras* (C-22/08), in which the ECJ is asked to reply to the question, *inter alia*, as to whether Article 24(2) of Directive 2004/38/EC is compatible with Article 12 jo. 39 EC and, if that is not the case, whether the latter articles preclude national rules which exclude Union citizens from receipt of social assistance if the maximum period of residence permitted under Article 6 of the Directive has been exceeded and there is no right of residence under other provisions.

⁶⁷ See recitals 10, 16 21 and Articles 7, 8, 12-14 and 24.

⁶⁸ See e.g. *Hoeckx* (247/83).

The reference to social assistance *system* seems to indicate that it covers more than the narrowly defined notion of social assistance under Regulation 1408/71. A similar indication would seem to follow from the description of social assistance contained in Directive 2003/109/EC – which is another Community instrument concerning rights relating to residence. Under Article 11(4), Member States can limit equal treatment as regards social assistance and social protection for third country nationals who are long-term residents, to core benefits. Recital 13 defines core benefits with respect to social assistance as covering at least “minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care”⁶⁹. On the other hand, Article 8(4) of Directive 2004/38/EC could suggest that social assistance refers only to means-tested benefits.

These are only assumptions. The fact is that the interpretation of the concept of social assistance in Directive 2004/38/EC should be clarified by the Community legislature or, failing this, by the ECJ, not least because the issue is of paramount importance for assessing the interrelation between the Directive and the coordination Regulations.

What is certain, though, is that, should a case involving the interpretation of the concept come before it, the ECJ would not feel bound by national classifications of social assistance⁷⁰.

III.3.c) Interaction with the coordination Regulations

Subject to the exceptions set out in Article 24(2) of Directive 2004/38/EC, all Union citizens (and members of their family) residing on the basis of this Directive in the host State are entitled to equal treatment with nationals of this State as regards access to social benefits.

It should be stressed in this regard that Article 24 of Directive 2004/38/EC does not grant an automatic entitlement to benefits in the host State – or, in case of social assistance benefits, an entitlement to benefits after three months. It grants equal treatment with the host State’s nationals, which does not necessarily rule out (indistinctly applicable) residence conditions for entitlement to benefits under that State’s legislation. Such requirements are likely to be indirectly discriminatory but might be justifiable insofar as benefits representing an unreasonable burden on the public purse are concerned, such as minimum subsistence benefits.

Unlike Regulation 1408/71 and the case law applying and interpreting it, Directive 2004/38/EC does not contain any definition of the concept of “residence” for the purpose of the implementation of its provisions. It seems to adopt a very wide definition, covering every period of stay by a Union citizen subsequent to the entry on to the territory of a Member State of which they are not a national. Hence, it covers also short-term stays, for tourist or other reasons (see Article 6 on residence for up to three months). It is contended that this should not prevent access to social benefits in the host State being subject, pursuant to the legislation of the Member State, to a residence requirement within the meaning of the legislation of that Member State. Otherwise tourists would be entitled in the State they visit to social benefits, with a risk of genuine “social tourism”⁷¹. However, “residence” under the

⁶⁹ However, it is reasonable to assume that the description of recital 13 actually refers to core benefits of social assistance *and* social protection – as mentioned in Article 11(4) of the Directive.

⁷⁰ Benefits which according to the Regulation are special non-contributory benefits or even social security benefits are often domestically classified as social assistance. This is e.g. the case in Belgium, as regards the income guarantee for elderly persons (special non-contributory benefit for coordination purposes) and the guaranteed family benefit (social security benefit for coordination purposes). Cf. the Belgian reply to the trESS questionnaire.

⁷¹ It could also be contended that unequal treatment of tourists as regards social benefits does not raise an issue of discrimination with host State nationals as the situations are not comparable: see

legislation of a Member State may have a different meaning compared to the meaning of this concept under Directive 2004/38/EC.

It follows that situations may occur in which a person “resides” in a Member State under Directive 2004/38 – and hence is entitled to equal treatment under Article 24 – but does not “reside”, i.e. has not established her or his habitual centre of interests there. Conversely, the fact that a person is “*Swaddling* resident” in a certain Member State does not necessarily imply that his or her residence is legal from the perspective of the Directive.

The equal treatment provisions of Directive 2004/38/EC and the case law on which they are based can have a profound impact on the coordination system put in place on the basis of Article 42 EC and can even challenge some of the basic solutions laid down in Regulations 1408/71 and 883/2004.

As already indicated, when the coordination rules determine that the *lex loci domicilii* is applicable, national residence requirements in the legislation of the competent State must conform to the *Swaddling* concept of residence, whereas durational residence requirements must be dealt with via the aggregation principle. Tensions could exist between the Regulation and the Directive. This is the case notably as regards special non-contributory benefits. A person who transfers her or his habitual centre of interest to the host State could be entitled to an Annex IIa benefit from the first day, on the basis of Article 10a of Regulation 1408/71. However, in accordance with the Directive, such a person could have this benefit withheld during the first three months of his or her residence in that State – that is, provided that the notion of social assistance encompasses these benefits, which is not clear (cf. III.3.b). In general, potential conflicts arise as regards the application of the three months rule in Article 24(2) of the Directive to situations falling within the scope of the Regulation *ratione personae* (e.g. pensioners) and *ratione materiae* (e.g. residual health care schemes), where the legislation designated as applicable is that of the State of residence and the aggregation and non-discrimination principles can be relied upon (cf. also *infra*, sub IV).

More fundamental questions arise when it comes to the interaction between the equal treatment provisions of the Directive and the coordination Regulation in cases in which the *lex loci laboris* is applicable. Entitlement to equal treatment under Article 24 of Directive 2004/38 applies to all Union citizens, including employed and self-employed persons. The application of that provision does not depend on the condition that the persons concerned are economically active in the host State. They may well be working in another Member State, and hence be subject, under Regulation 1408/71 and Regulation 883/2004, to the social security legislation of that State (e.g. frontier workers). As Directive 2004/38 does not contain any rules of conflict such as those in Title II of Regulation 1408/71, the question arises whether reliance on Directive 2004/38 could lead to an effective entitlement to benefits for which normally the competent State within the meaning of coordination Regulation 1408/71 should be responsible (such as the State of activity or the State paying a pension). In other words, can the principle of equal treatment with host State nationals stemming from Articles 12 jo. 18 EC and Article 24 of Directive 2004/38/EC strike down the principle of a single legislation applicable, and, for instance, allow an active frontier worker to receive benefits in the State of residence? The same question can be posed for pensioners residing in a State from which they do not draw any pension or other income. To argue that the *Bosmann* case testifies to the fact that the ECJ has abandoned the concept of the exclusive character of the rules determining the legislation applicable, would be premature, for the reasons set out above *sub* II.1.c.ii), notably connected with the specific context of family benefits.

e.g. P. SCHOUKENS, “Europees burgerschap: toegang tot de gezondheidszorg voor EU-burgers op basis van maatschappelijke dienstverlening”, *Tijdschrift voor Gezondheidsrecht* 2006-2007, 23.

Nevertheless, the questions raised are not merely academic ones, as is shown by the practice in some Member States. In Austria, the provision of *Pflegegeld* to resident pensioners drawing a pension from Spain is based on Article 18 EC. Under Austrian legislation, these pensioners are entitled to this long-term care benefit (a sickness cash benefit for coordination purposes). However, Spain does not provide a similar benefit which could be exported in accordance with Article 28 of Regulation 1408/71. Another example can be found in Spain, where Union citizenship is the basis of entitlement to sickness benefits in kind for self-employed persons posted from Germany. Under the competent German legislation, these persons are not entitled to benefits. Pursuant to Spanish legislation, however, an entitlement to health care exists.

It is interesting to note that the European Commission is also of the opinion that Article 18 EC might produce effects in terms of access to insurance in situations falling within the scope of the coordination Regulation. In an answer to a parliamentary question by Ms. Oomen-Ruijten MEP regarding the affiliation to the Flemish long-term care insurance of pensioners resident in Flanders and drawing a Dutch pension⁷², the Commission states as a matter of principle that these pensioners are subject to Belgian legislation pursuant to Article 13(2)(f) of Regulation 1408/71. The Commission goes on to say that this Article is without prejudice to the special provisions of Title III, including Article 28. According to this provision, cash benefits are provided by the institution of the State paying a pension. The Commission concludes that “nevertheless, on the basis of Article 18 EC, the persons living in the Dutch-speaking part of Belgium should in principle be able to affiliate to the Flemish long-term care insurance on a voluntary basis”⁷³. It should be noted that the benefits provided by the Flemish long-term care insurance are sickness cash benefits and that no similar benefits are provided under Dutch legislation.

These examples – and indeed also the situation which gave rise to the *Bosmann* case – have in common, in addition to the existence of an entitlement pursuant to the legislation of the State of residence, the lack or restriction of entitlement under the legislation designated as competent by the coordination Regulations⁷⁴. In such cases, in which the coordination system clearly reaches its limits, to refuse the State of residence the right to grant benefits would arguably be in keeping with the objective set out in Article 42 EC and be seen very negatively by the European citizen. In these situations, which typically concern sickness and family benefits, to set aside a strict application of the exclusive character of the legislation applicable to give effect to an entitlement under national legislation does not substantially undermine the coordination logic. Nevertheless, it must be acknowledged that if this were to be a legal obligation, on account of Community law, this would be felt above all by the Member States operating residence-based schemes – which, it could be argued, are filling gaps left by other States’ systems.

The situation is different if the competent State provides entitlement to the benefits concerned. It would be difficult to accept that persons, relying on the Directive, would be entitled to similar benefits in more than one Member State, by accumulating entitlements as insured persons under the coordination Regulations on the one hand, and Union citizens / residents of the host State, on the other. Could such accumulation only be avoided by national anti-accumulation rules? It is possible to go further to consider situations where

⁷² Written question E-5140/08 of 24 September 2008.

⁷³ Answer by Mr. Spidla on behalf of the Commission of 24 October 2008.

⁷⁴ Compare the pending case *von Chamier-Glisczinski* (C-208/07), in which the ECJ is asked to decide whether Article 19 of Regulation 1408/71, in conjunction with Article 18 EC, is to be interpreted in such a way as to require the institution of the State of residence – whose legislation, unlike that of the competent State, does not provide for long-term care benefits in kind – to provide cash benefits on behalf of the competent institution, to an amount corresponding to the value of the benefits in kind concerned.

persons would be able to choose to receive benefits in accordance with the legislation which is most favourable in terms of benefits and contributions. Could a pensioner drawing a pension from a State operating a contribution-based system and residing in a State where access to health care is contingent upon residence alone, invoke Article 18 EC to forego the application of the coordination Regulation and to opt to affiliate to the health care system of the State of residence only? This option would spare her or him paying contributions to the Dutch system, while offering the same entitlements⁷⁵.

As this last example demonstrates, the implications of the developments regarding citizenship for social security coordination are potentially huge and might necessitate the coordination mechanisms being completely rethought. It is also clear from the above that residence-based schemes are a key issue in this respect, as it is these schemes where entitlement to benefits is likely to exist on the basis of national law alone.

It must be stressed, however, that it is not certain that European citizenship in conjunction with equal treatment will have these effects, let alone how far-reaching this impact might be. So far, no concrete examples can be cited where the system of the coordination Regulation, in particular the strong and exclusive application of the *lex loci laboris* for economically active persons, was directly challenged by the principle of equal treatment in the State of residence under Articles 18 jo. 12 EC and Article 24 of Directive 2004/38/EC. At this stage, it would appear that any immediate danger to the coordination Regulation's provisions stems rather from the ECJ case law on Article 39 EC subjecting the Regulation's exceptions to the principle of exportability of benefits to a proportionality assessment – notably *Hendrix* (C-287/05) and *Petersen* (C-228/07) – and even these cases should be put into perspective⁷⁶.

There could indeed be an argument, pursuant to the *lex specialis* principle, that when a situation comes within the scope of the coordination Regulation, this instrument applies. In these cases, an appeal to the equal treatment provision of Directive 2004/38/EC would not be possible. Under this solution, it could still be accepted that, if a person holds an entitlement under the legislation of a State other than the competent State, the Regulation does not preclude the former State from granting it – without being obliged to do so. Only in cases which fall outside the scope of the Regulation would the provision of equal treatment under the Directive provide access to social benefits in the State of residence.

If this view were taken, it could be envisaged that the Community legislature would take a stand on the legal relationship between the coordination Regulation and the Directive. One possibility in that respect would be to amend the latter instrument and to insert a provision similar to Article 42(2) of Regulation 1612/68, stating that the Directive shall not affect measures taken in accordance with Article 42 EC. Such an amendment would reflect the view that the coordination Regulations take precedence, as *lex specialis*, over Directive 2004/38/EC⁷⁷.

Consideration could also be given to examining whether legislative action at national level could prevent cases of undesirable overlapping, notably by introducing into national social security legislation provisions to exclude from entitlement under residence-based benefit schemes those persons to whom, on the basis of Regulation 1408/71 or Regulation 883/2004, the social security scheme of another Member State applies. In particular, it

⁷⁵ Such a situation is in fact reported in Finland, albeit without reference to Article 18 EC, as regards pensioners drawing a pension from States whose legislation provides for the possibility to terminate health insurance voluntarily (cf. European Report 2008 - Finland).

⁷⁶ By which we mean that the ECJ has by no means invalidated the Regulation's provisions dealing with export restrictions as regards special non-contributory benefits and unemployment benefits.

⁷⁷ The effect of such a provision might be rather limited, however, judging from how the ECJ dealt with Article 42(2) of Regulation 1612/68 in the *Hendrix* case (C-287/05, paras 51 e.s.).

should be looked into whether such a national condition constitutes indirect discrimination on the basis of nationality and hampers free movement of persons, and, if it does, to what extent it can be objectively justified.

A different option would be to try to accommodate these developments, rather than resist them. An intervention of the Community legislature – notably a reform to the coordination rules – could create an opportunity to frame these new rights attached to the status of citizen and to find a balance between asserting them and preventing unjustified overlapping of benefits. One option in this respect would be to extend the scheme of priority rules currently in place for family benefits, to other chapters of the Regulations.

In addition to these options, the European legislature should also consider taking action to reduce the legal uncertainty surrounding the free movement of non-economically active citizens. With the double objective of preventing economically non-active persons from falling between two stools and of sharing the financial burden between States, the embryonic coordination scheme stemming from Article 24 of Directive 2004/38/EC could be completed and embedded in a wider set of coordination rules for minimum subsistence benefits that are not yet covered by the coordination Regulation. This new system of rules could perhaps be inserted in Regulation 883/2004 – whose material scope would extend to all benefits which on the basis of a legally defined position provide assistance to persons in need/poverty. Inspiration for such a system could of course be found in the coordination scheme which is already applicable to the special non-contributory cash benefits⁷⁸. Special coordination provisions could apportion the financial responsibility for providing minimum subsistence benefits to economically non-active persons; it could, for instance, be stipulated that during an initial period of three months following the entry on to the territory of the host State, benefits provided are covered by the State of origin – up to the amount of similar benefits provided under its own legislation. Provision could be made for a system of cost compensation for a longer period of time (e.g. one year).

IV. Obtaining and maintaining the right of residence under Directive 2004/38/EC – the impact of the coordination Regulations

Directive 2004/38/EC grants the right of residence for up to three months to all Union citizens without any conditions or any formalities other than the requirement to hold a valid identity card or passport (Article 6(1)). Nevertheless, Article 14(1) of Directive 2004/38/EC guarantees the retention of the right of residence provided for in Article 6 to Union citizens as long as they do not become an unreasonable burden on the social assistance system of the host Member State.

The right of residence for more than three months continues for economically non-active persons to be subject, as was the case in previously applicable Directives 90/364, 90/365 and 93/96, to having sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State as well as having comprehensive sickness insurance (Article 7(1)(b) and (c))⁷⁹. These requirements to

⁷⁸ See, in this respect, H. VERSCHUEREN, “European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems”, *European Journal of Migration and Law* 2007, at 342. See also J.-C. FILLON, “La citoyenneté de l’Union européenne et la coordination des régimes de sécurité sociale”, *Journal des tribunaux du Travail* 1999, 399.

⁷⁹ Whereas some Member States have more or less literally translated article 7 of Directive 2004/38/EC into national legislation and thus set out that, for the right of residence, personal

have sufficient resources and comprehensive sickness insurance do not apply to workers and self-employed (see also Article 14(4)(a)). The residence rights of these people directly follow from the EC Treaty provisions on the free movement of workers and of service providers.

Article 8(4) specifies that “Member States may not lay down a fixed amount which they regard as ‘sufficient resources’, but must take into account the situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State”.

Article 14(2) of Directive 2004/38 limits the residence right to Union citizens and their family members as long as they meet the conditions set out in Article 7 which for non economically active persons means having sufficient resources. It continues by stating that in specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, including the conditions on sufficient resources and health care coverage, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically. Article 14(3) provides that an expulsion measure shall not be the automatic consequence of a Union citizen or his or her family member's recourse to the social assistance system of the host Member State. Finally an expulsion measure may not be adopted against Union citizens or their family members if the Union citizens entered the territory of the host Member State in order to seek employment. In this case, Union citizens and their family members may not be expelled as long as they can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged (Article 14(4)(b)).⁸⁰

These provisions reflect the ECJ case law, discussed above, on access to social benefits on the basis of the EC Articles 12 and 18. The gist of this case law is that the substantive residence conditions cannot be applied in a mechanical fashion, but that their application should be considered in the light of all the circumstances of the individual case⁸¹. In particular, account should be taken of whether the difficulties are temporary or are of a

resources must not be lower than the level of social assistance or minimum pension, there is not much information available about the administrative procedures for assessing if a person actually has “sufficient resources” or these procedures are still under consideration. The “sufficiency test” provided by the Directive leaves considerable discretion to the national authorities with the competence to decide how the personal situation needs to be taken into account, how the person is to document that s/he has sufficient resources and when such documentation is adequate and reliable. At the national level, the burden of proof so far remains with the individual and in practice the mandate to approve such proof remains with the national authorities. However, the discretion left to the national authorities must be used in accordance with the proportionality principle. In order to address how the Directive is implemented, more systematic attention needs to be devoted to national responses and implementation in the future. Interesting in this regard will be the implementation report on Directive 2004/38/EC which is currently being prepared by the Commission and which should be adopted in November 2008. At this stage, it is too early to draw final conclusions on the national practices in implementing the Directive 2004/38/EC, and assessing how the relationship between this Directive and the coordination Regulations is seen at the national level.

⁸⁰ See *Antonissen* (C-292/89).

⁸¹ In *Baumbast* (C-413/99) for instance, the ECJ in ruling that a refusal of the exercise of the right of residence of Mr. Baumbast would be disproportionate, took account of the fact that Mr. Baumbast had sufficient resources, that he worked and therefore lawfully resided in the host Member State for several years, that during that period his family also resided in the host Member State and remained there even after his professional activities in that State came to an end, that neither Mr. Baumbast nor the members of his family have become burdens on the public finances of the host Member State and, lastly, that both Mr. Baumbast and his family have comprehensive sickness insurance in another Member State of the Union (para 92).

structural nature, the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on the social assistance system and to proceed to his or her expulsion (recital 16). This implies, for example, that those who first arrive in the territory of the host State without fulfilling the residence conditions cannot count on the same approach that is taken with people who have fulfilled the conditions, and on that basis have acquired the right of residence of more than three months, but owing to circumstances, are temporarily unable to fulfil the conditions, for example, due to a car accident or separation⁸².

The ECJ also confirmed that the origin of a person's resources is not relevant in order to assess the fulfilment of the resources requirement in the Residence Directives. In *Zhu and Chen* the ECJ said that, according to the terms of the provisions, it is sufficient for nationals of Member States to 'have' the necessary resources, and that these provisions do not specify their origin. The ECJ adds that the correctness of that interpretation is reinforced by the fact that provisions laying down a fundamental principle such as that of the free movement of persons must be interpreted broadly.⁸³

Entitlement to a social benefit or to health care coverage on the basis of Community law seems therefore to be able to provide the basis of a residence right in the host State. This is clearly true in cases of export of benefits such as pensions and health care coverage on behalf of another Member State than the host State, pursuant to specific provisions in Regulations 1408/71 and 883/2004, for instance for pensioners, frontier workers (and the members of their family) or for members of the families of workers.

However, this is less certain as regards entitlements which are at the expense of the host State. Questions are raised on the application of the equal treatment principle in Article 3 of Regulation 1408/71 and Article 4 of Regulation 883/2004 to persons subject, according to the rules in Title II of these instruments, to the legislation of the State of residence. This application would mean that these persons should be entitled to all social benefits and to the health care coverage available to resident nationals of the host State, under the same conditions as those applicable to these residents. Is such entitlement a sound foundation for the residence rights of these economically non-active persons?

Other questions could also be raised, notably on the relationship between these provisions of Directive 2004/38/EC and entitlement, based on residence, under Regulation 1408/71 to the benefits listed in Annex IIa.

Are persons who want to invoke Regulation 1408/71 in order to claim a special non-contributory benefit in the Member State in which they reside, putting their right of residence at stake because they no longer fulfil the requirements for having a right to reside in the host State under Directive 2004/38/EC? Or is it the opposite: are persons entitled under Regulation 1408/71 to these benefits of the host Member State, automatically fulfilling the subsistence requirement for obtaining or maintaining residence rights under Directive 2004/38/EC?

As indicated above, the view might be defended that the coordination Regulation takes precedence over the Directive on the basis of the *lex specialis* principle, which would result in a positive answer to the last question.

Other arguments could be advanced in favour of such an answer.

⁸² Cf. the concept of "*accident de la vie*" used in the French Circulaire N° DSS/DACI /2007/418 of 23 November 2007 on the benefit of CMU/CMUc for EU/EEA/Swiss citizens residing or wishing to reside in France as non-active persons, students or jobseekers.

⁸³ *Zhu and Chen* (C-200/02), para 30-31. See also *Commission v. Belgium* (C-408/03), para 40.

The provisions of Regulation 1408/71 that grant access to special non-contributory benefits in the State of residence do not refer to residence as being a requirement for which the legal status of the residence would be relevant. They neither make their application subject to the fulfilment of the criteria for obtaining a residence right under Directive 2004/38 or its predecessors. Yet, the legislature was able to do so. Indeed, these provisions in Regulation 1408/71 were introduced by Regulation 1247/92 of 30 April 1992, almost two years after the adoption of Directives 90/364 and 90/365. The same is true for the corresponding provisions in Regulation 883/2004 which was adopted on the same day as Directive 2004/38 (on 29 April 2004) or of the amendments made to the provisions of Regulation 1408/71 by Regulation 647/2005 of 13 April 2005, almost one year after the adoption of Directive 2004/38.

The ECJ for its part did not refer to any condition in relation to the former and current residence Directives when it defined the criteria to determine whether a person, for the purpose of the application of the provisions on minimum subsistence benefits of Regulation 1408/71, is resident in a Member State or not. Neither did the Commission in its proposal for a regulation laying down the procedure for implementing Regulation 883/2004, nor the Council in its compromise (partial general approach) on these proposals of June 2006, refer to the person's status under Directive 2004/38/EC in order to establish where his or her place of residence would be.

It follows from the absence of any reference in Regulation 1408/71 to the person's status under the Residence Directive, that the entitlement to the benefits listed in Annex IIa of Regulation 1408/71 only depends on the condition of a person having, in fact, her or his habitual centre of interest in a Member State and not on the legal nature of this residence under Directive 2004/38. Any person habitually resident within the meaning of Regulation 1408/71 (and Regulation 883/2004) is, on the basis of these Community legal instruments, entitled to these benefits (provided of course s/he fulfils the other relevant criteria under the national legislation such as an income threshold).

Consequently, this person can be entitled to an Annex IIa benefit of the host State by relying only on the provisions of Regulation 1408/71. Once s/he has obtained the benefit, s/he will then most probably fulfil the subsistence requirement under Directive 2004/38/EC for obtaining or maintaining a residence right in the host State. As a result, Regulation 1408/71 and its provisions on the coordination of Annex IIa benefits could enable Union citizens moving from one Member State to another to obtain sufficient income in the host State in order to fulfil the subsistence requirement for obtaining a residence right in that host State.

This seems to be logical. Any other conclusion would make this special coordination system meaningless. If a person first had to prove that her or his residence in the host State is in line with the subsistence requirement under Directive 2004/38/EC before s/he could even claim a minimum subsistence benefit under Regulation 1408/71, it would never be possible for him/her to do so. Indeed when applying for a minimum subsistence benefit s/he would demonstrate that s/he is no longer fulfilling the condition concerning sufficiency of resources under Directive 2004/38/EC. In this hypothesis s/he would put his or her right of residence in jeopardy by claiming a benefit under Regulation 1408/71, which would of course undermine the *effet utile* of the provisions of Regulation 1408/71. Besides, as explained above, by transferring his or her residence from one Member State to another, this person is losing the entitlement to an Annex IIa benefit in the first Member State. Refusing a similar benefit in the second Member State on the basis of Directive 2004/38 would let that person fall between two stools.

Moreover, the provisions of Directive 2004/38/EC discussed above aim at preventing an EU citizen becoming an unreasonable burden on the social assistance system of the host

Member State.⁸⁴ It would be absurd to consider relying on Regulation 1408/71 for the application of an Annex IIa benefit as being unreasonable.

V. SOME CONSTITUTIONAL REFLECTIONS ON THE ROLE OF THE COMMUNITY LEGISLATURE AND THE COURT OF JUSTICE IN REDEFINING THE BOUNDARIES OF THE WELFARE SYSTEM

The role of residence in defining social security rights and creating a linking element in the interaction between social security coordination and the Residence Directive might have effects at the level of the Treaty and on the division of competences. Therefore, alternative paths should be examined within a wider constitutional framework.

Freedom of movement, from being a simple economic right, has become “the concrete expression of a real Union citizenship”⁸⁵ and the objective anticipated by Advocate General Ruiz-Jarabo Colomer has almost been attained, thanks to the case law of the ECJ:

*“the creation of citizenship of the Union, with the corollary of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union”.*⁸⁶

Today it is a commonplace that European citizens can exercise their rights of movement and residence and be entitled to access national social protection systems; the fundamental freedom protected by Article 18 EC, provides certain criteria which the national authorities should take into account within the context of the proportionality assessment.⁸⁷ The ECJ has undoubtedly brought about a change with constitutional repercussions: on the one hand, momentum is given to a new paradigm of social solidarity for the European Union; on the other, the relations between the ECJ itself – as a fully-fledged constitutional court – and the Community legislature are undergoing radical changes.

The ECJ’s role in “social engineering” the status of Union citizen to replace entitlement based on market freedoms, is the engine of new forms of cross-border solidarity. This form of solidarity, though still in its infancy, is a development and departure from the *mechanical* and *functional*⁸⁸ forms that dominated the history of the construction of the integrated market and which was addressed, in principle, only to the active players in the process of European production and circulation of wealth. In fact, an idea of solidarity emerges here, whose vocation is to expand both beyond the circle of those who take part in market processes (though at a European level), and, at the same time, beyond the boundaries of national

⁸⁴ See recital no 16 in the preamble to this Directive.

⁸⁵ Commission of the European Communities, *The third report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens* COM(2006) 56 final, 5 April 2006, 9.

⁸⁶ Para 82 of the Opinion delivered in *Morgan* (joined Cases C-11/06 and C-12/06).

⁸⁷ M. DOUGAN, “The Court Helps Those Who Help Themselves...The Legal Status of Migrant Work-seekers under Community law in the Light of *Collins* judgement”, *E.J.S.S.* 2005, 7, 24.

⁸⁸ To paraphrase R. ZOLL (*Was ist Solidarität heute?*, Frankfurt, 2000), who, in turn, has reworked Durkheim’s well-known distinction.

communities, within which the welfare state has historically operated. Hence, it has the characteristic of *organic* solidarity implemented “among strangers” across borders⁸⁹.

Between the two circles of European solidarity – the *mechanical*, which is typically addressed to economically active individuals, and the *organic*, whose foundations rest on the general and inclusive sphere of the new common *civitas* – there are still outstanding differences, but the gap between the two is gradually closing.⁹⁰

Economically non-active nationals can certainly have restrictions imposed on their rights of residence and cross-border access to social protection that are not permitted for employed or self-employed persons exercising their freedom of movement. The eligibility criteria for the former are different, and indeed harsher, than those for the latter. According to the ECJ's case law,⁹¹ criteria such as ‘habitual residence’, ‘sufficient degree of integration into the host country’, ‘genuine link with its labour market’ (for jobseekers), may determine access to forms of social protection for Union nationals who do not work, but cannot be a requirement for people who enjoy the status of workers pursuant to Article 39 EC⁹². There is also the concept of “unreasonable burden” that further defines the boundaries to financial solidarity for mobile Union citizens in need; this limit cannot apply to those who are entitled to the “mechanical” solidarity based in Article 39 EC.

These differences seem to be losing their practical relevance once assessed in the light of the proportionality test. It is evident that those persistent differences in the eligibility criteria laid down for non-active European citizens tend to be played down within the flexible and “context sensitive”⁹³ consideration of proportionality. Once again, attention must be drawn to the limits of the unreasonable burden posed to the social assistance system of the host Member State: so far the ECJ has been very cautious in applying it and has instead focused on the requirements of the welfare states’ budgets.⁹⁴ Yet, everything clearly depends on the actual allocation of the burden of proof with regards to the practical conditions under which the Member State concerned may rely on this constraint. In this respect, the ECJ seems to be requiring more stringent conditions: in fact – though with reference to a case that is somewhat different from the ones analysed – it has recently made clear that it is (no longer) satisfied with generic claims about the adverse financial effects that granting benefits to those who are currently excluded from them may have if those claims are not adequately substantiated.⁹⁵

This final consideration brings us back to the other notable constitutional innovation operated by the ECJ's case law. DOUGAN has convincingly argued that in interpreting Articles 12 and 18 of the Treaty, the ECJ has pushed its teleological approach so far as to surpass the functional approach to reasoning “ordinarily applicable to the purely economic Treaty

⁸⁹ For this terminology see J. HABERMAS, *The Postnational Constellation. Political Essays*, Cambridge, 2001.

⁹⁰ See the critical remarks of Advocate General GEELHOED in his Opinion in *Hartmann* (C-212/05), paras 34 and 38.

⁹¹ These criteria can be found, for example, in *Bidar* and *Collins*.

⁹² See, however, *Geven* (C-213/05), discussed above.

⁹³ M. DOUGAN, “The Constitutional Dimension to the Case Law on Union Citizenship”, *European Law Review* 2006, 624.

⁹⁴ See, in this regard, S. Besson and A. Utzinger, ‘Introduction: Future Challenges of European Citizenship–Facing a Wide-Open Pandora’s Box’, (2007) *ELJ* 573, especially at 587.

⁹⁵ See joined cases *Doris Habelt, Martha Möser, Peter Wachter v Deutsche Rentenversicherung Bund* (C-396/05, C-419/05 and C-450/05), in which the ECJ ruled that “the German Government has failed to demonstrate how transfers of residence from Germany such as those which took place in the cases in the main proceedings, are liable to impose a heavier financial burden on the German social security scheme” (para 83). See also *Petersen* (C-288/07), paras 57 e.s.

provisions”.⁹⁶ This is demonstrated by the fact that the ECJ – through the review of conformity of national implementation measures – carries out an increasingly stringent review of proportionality over Community secondary legislation. As the author also noted, “the *Baumbast* rule is something of a constitutional novelty: the Court of Justice has chosen to subject Community secondary legislation *indirectly* to a level of judicial scrutiny normally associated with Member State action”.⁹⁷ Unlike what has traditionally happened with regard to the economic freedom of movement in rulings such as *Grzelczyk* and *Baumbast*, the ECJ has not refrained from carrying out a review of proportionality under Articles 12 and 18 EC over national measures that appeared to fully comply with Community secondary legislation; “and in effect – that is, *indirectly* and through the medium of the Member States – this amounts to *judicial review of that very Community legislation*, not of the privileged sort one would expect as regards questions of competence in the exercise of Community’s own legislative powers, but rather of the front line sort one witnesses all the time as regards national provisions restricting free movement under the primary Treaty provisions”.⁹⁸

Guided by the rule of reason and the various considerations of adequacy and proportionality tests⁹⁹, the ECJ performs a perceptive role in reviewing the constitutionality of decisions made by the Community legislature, which may limit the discretion conferred on the legislature when exercising its powers. The review of proportionality performed by the ECJ could be seen to pose a challenge to the European legislature's autonomy, competencies and powers.¹⁰⁰ Thus, the question is no longer limited to the powers that Member States exercise under Community law, but also, although indirectly, to the powers of the Community legislature itself.¹⁰¹

The ECJ is, however, obliged to decide the cases brought to it because the Community legislature might not have used its competences to legislate, or, because of the legal uncertainty, or, because of the broad margin of discretion left for the national legislature and administrations which creates uncertainty on the correct interpretation of Community law .

The national courts have not yet referred questions to the ECJ on the problems of interpreting Directive 2004/38/EC in the context of the application of Regulation 1408/71. As long as the European legislature has not taken any steps to clarify certain concepts (e.g. social assistance) or to give an indication of which of these instruments has priority in a case of conflict, Member States are facing the challenge. National administrations are forced to reach a solution, at least in individual cases, and – in order to create legal certainty and equal treatment – national legislative measures may be adopted to solve the tension between the aims and objectives of the Directive and the Regulation.

The emerging concepts of European social solidarity

The boundaries of membership to the communities of solidarity-based redistribution defined by national welfare schemes have – thanks to ECJ case law – become more open and permeable, and hence more inclusive, at least for European citizens. Union citizenship, from being a complementary and secondary institution, as it was considered in the Maastricht revision, has moved to the heart of deep constitutional transformation and now provides a

⁹⁶ M. DOUGAN, “The Constitutional Dimension to the Case Law on Union Citizenship”, *European Law Review* 2006, 625.

⁹⁷ *Ibid.*, 614.

⁹⁸ *Ibid.*, 620-621.

⁹⁹ See M. ROSS, “Promoting Solidarity: From Public Services to a European Model of Competition?”, *Common Market Law Review* 2007, 1067.

¹⁰⁰ See also S. BESSON and A. UTZINGER, “Introduction: Future Challenges of European Citizenship–Facing a Wide-Open Pandora’s Box”, *European Law Journal* 2007, 575.

¹⁰¹ In this regard, the stance illustrated in the Advocate General's Opinion in *Hendrix*, notably para 57, is emblematic.

sound platform for new bonds of “mutual social responsibility”¹⁰² among Member States' citizens. The opening up of welfare schemes to economically non-active Community citizens who can demonstrate a certain degree of integration into the society of the host country may rightly be considered to be the founding act of a new and more advanced notion of European solidarity.¹⁰³

However, the area of European solidarity, whose new boundaries have been, in part, defined by the ECJ, is not exempt from significant constraints and contradictions. Even though there is no conclusive empirical evidence, there is a risk that the erosion of domestic control of the Member States over access to welfare may in turn bring about a reduction in the provision of social benefits, thus triggering a dynamic of “social levelling-down”.¹⁰⁴ However, it is an only apparent paradox that the progress of a body of case law that is inspired by a genuine ethos of integration may bring about a diminution of social solidarity.

Such a risk may be intrinsic to the position that the ECJ was forced to adopt, which inevitably is individualistic as it is tailored to the single case heard by the Court.¹⁰⁵ Yet, an approach based on the rights of individuals – even of Union citizens in need claiming a form of social assistance in the host Member State – misses the necessarily collective dimension of solidarity.¹⁰⁶ Financial solidarity among Member States' citizens thus becomes the piecemeal, individualistic solidarity uprooted from a collective context: the dominant dimension of the European cross-border solidarity sanctioned by the ECJ in the individual case examined turns out to be the fragmented one which is individually and sometimes opportunistically accessed by European citizens who have exercised their freedom of movement. From this perspective, a recovery of the truly collective dimension of social solidarity may be traced in those ECJ's rulings in which, by balancing the State's interest in keeping public spending under control and the individual exercise of a fundamental freedom, the ECJ emphasises a limit such as the “unreasonable burden” that is also considered by Directive 2004/38/EC.

By subjecting collective solidarity to a still dominant market-integration rationale, the ECJ, quite apart from performing a corrective balancing exercise between fundamental social rights and market freedom, reveals itself to be bound within this individualistic and paradoxical paradigm of “European solidarity”. Hence, the ECJ should refrain from excessive interference with the powers of the (European) legislature with reference to the fundamental rules and procedures that are instrumental to the definition of those boundaries.

To avoid the case-by-case approach of the ECJ to the issues raised by the present report, the European legislature must clearly lay down appropriate rules, which are capable of balancing, on a necessarily general level, considerations of control over public spending and elimination of forms of free riding, with those of individual freedoms.

The re-definition of the boundaries of the welfare systems of the “Old Europe” certainly requires new and suitable *political* answers. As already observed, it is an integral part of a

¹⁰² J. H. H. WEILER, “To be a European citizen”, in *Scritti in onore di Giuseppe Federico Mancini*, Vol. II, *Diritto dell'Unione europea*, Milan, 1998, 1095.

¹⁰³ See M. ROSS, “Promoting Solidarity: From Public Services to a European Model of Competition?”, *Common Market Law Review* 2007, 1065.

¹⁰⁴ S. BESSON and A. UTZINGER, “Introduction: Future Challenges of European Citizenship—Facing a Wide-Open Pandora's Box”, *European Law Journal* 2007, 589; Cf. M. FERRERA and S. SACCHI, “A More Social EU? In What Areas? In What Forms?”, *URGE Issue Paper*, No 1/2007, 5, available at www.urge.it.

¹⁰⁵ See C. NEWDICK, “Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity”, *Common Market Law Review* 2006, 1645.

¹⁰⁶ See also D. KOSTAKOPOULOU, “European Citizenship: Writing the Future”, *European Law Journal* 2007, 636-638.

new social question that directly affects the scope of European Union to guide complex processes of economic and social restructuring. And it is difficult to imagine that the ECJ, inspired as it may be by the best intentions, may alone provide the answers that are needed.

However, one must be aware that the institutionalisation of a properly European form of social solidarity could press the Community legislature beyond a mere logic of coordination of national welfare systems. Organic solidarity among strangers might require a minimum core of citizenship-based social benefits that are governed, and at least in part financed, at the Community level. Yet the establishment of a European-wide organised collection and pooling of financial resources, which would bring the “ever closer union among the peoples of Europe” to another level, does not seem near¹⁰⁷.

Annex: Table national residence conditions

¹⁰⁷ See M. COUCHEIR, M. and JORENS, Y., “Patient Mobility in the European Union - The European Framework in Relation to Patient Mobility”, report written for the European 6th Framework project 'Europe for Patients', European Commission, DG Research, Brussels, 2005, 64.